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ALLAHABAD SERIES,

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CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY

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High Court, Allahabad .. A. STRACHEY, *Inner Temple.* D. BANERJI, *Lincoln's Inn (Offg.)*

VOL. X.
1888.

ALLAHABAD:
PRINTED AT THE GOVERNMENT PRESS,
AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT,
UNDER THE AUTHORITY OF THE GOVERNOR-GENERAL IN COUNCIL.

JUDGES OF THE HIGH COURT.

CHIEF JUSTICE:

HON'BLE SIR JOHN EDGE, *Kt.*

PUISNE JUDGES:

HON'BLE DOUGLAS STRAIGHT.

„ M. BRODHURST.

„ W. TYRRELL.

„ SYED MAHMOOD.

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APPELLATE CIVIL.

1887
June 1.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

BEHARI LAL AND OTHERS (PLAINTIFFS) *v.* GANPAT RAI AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, ss 244, 291—*Sale in execution of decree—Tender of debt by transferee of property—Question for Court executing decree—Separate suit.*

Held that the assignees of a purchaser from a judgment-debtor of property, the subject-matter of a decree for enforcement of hypothecation, were entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under s. 291 of the Civil Procedure Code, and that the executing Court was bound to accept the money and stop the sale.

Held also, where the executing Court had refused to accept the money and the sale had taken place, that a suit by the assignees to set aside the sale and for a declaration of their right to come in under s. 291, was not barred by s. 244 of the Code.

THE facts of this case were as follows :—The defendants, Ganpat Rai and Shambhu Nath, in execution of a decree for enforcement of hypothecation of zamíndári property, which they had obtained against Musammat Ganra, caused the property to be attached and advertised for sale. Subsequently, the decree-holders having failed to pay the necessary fee for the issue of the proclamation of sale, the case was struck off the file on the 17th September, 1884.

On the 18th December, 1884, the judgment-debtor conveyed her proprietary right in the property to one Kundan Lal by a deed of sale which was registered on the date of execution.

* First Appeal No. 64 of 1886, from a decree of Maulvi Muhammad Maqsud Ali Khan, Subordinate Judge of Saharanpur, dated the 29th July, 1885.

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On the 6th January, 1885 the defendants made a fresh application for execution of their decree, and by an order passed on the next day, the 20th February was fixed for sale of the property.

On the 18th February, 1885, Kundan Lal conveyed his rights under the deed of the 18th December, 1884, to the plaintiffs, Behari Lal, Bindraban, Tej Nath, Shambhu Nath, Rahman Bakhsh, and Balram, by a deed of sale which was registered on the same date.

On the 20th February, the date fixed for the sale, the plaintiffs made an application under s. 291 of the Civil Procedure Code, to the Deputy Collector, who was the officer conducting the sale, for leave to pay the amount of the judgment debt and costs into Court. This application was opposed by the decree-holder on the allegation that the sale in favour of the petitioners had not been completed, and that the judgment-debtor had denied her sale to Kundan Lal. The Deputy Collector passed the following order:—"I cannot give permission to the petitioners to deposit money on the part of the judgment-debtor in any Court, inasmuch as the decree-holders cannot receive it. The petitioners should seek relief formally in reference to their right of purchase." The petitioners thereupon renewed their application to the Court executing the decree, but the application was rejected. The sale then took place, and the property was purchased by the decree-holders themselves on the 20th February, 1885.

The plaintiffs then instituted the present suit, in which they prayed "that the plaintiffs' right to pay off the amount of the defendants' decree, as representatives of the judgment-debtor, be declared; and that by setting aside the sale of the 20th February, 1885, at which the defendants became the purchasers, a decree for the property in suit be passed in the plaintiffs' favour with costs."

The Court of first instance (Subordinate Judge of Saháranpur) found that "the original vendor, Musammat Gaura, whose rights were under attachment and put up to sale, denied the sale executed by her." The material portion of the Court's judgment was as follows:—"In this case, when the plaintiffs offered to pay the money on the day fixed for sale, the defendants decree-holders, who represented the mortgagee, refused to receive the money, declaring the sale to be disputed and unadmitted. They were not bound, and

could not be compelled, to receive it. The Court could not receive the money in deposit and stay the sale by reason of such deposit. S. 291 does not contemplate the payment of money by a stranger asserting a disputed or unproved right in the property, and render it incumbent on the Court to receive it. As the decree-holders' refusal to receive the money and the Court's order not allowing it to be deposited were legally valid, and as the not staying of the sale was a necessary consequence thereof, the plaintiff is not entitled to the relief he seeks by his suit, nor is such a suit maintainable. Moreover, even if the sale alleged by the plaintiff had been admitted, he would not have been competent to bring a fresh suit. What he should have done was to apply to be made a party to the execution case." The Court accordingly dismissed the suit.

The plaintiffs appealed to the High Court.

The Hon. Pandit *Ajudhia Nath*, for the appellants.

The Hon. *T. Conlan* and Mr. *C. H. Hill*, for the respondents.

EDGE, C. J., and TYRRELL, J.—In this case the respondents had obtained a decree on a hypothecation bond against Musammat Gaura. They attached her property in execution thereof, but not having paid the proper fees into Court, the Court made an order striking the execution off the list of pending cases. That was on the 17th September, 1884. On the 18th December following Musammat Gaura sold the property in question to Kundan Lal. That sale deed was registered on the 18th February. Kundan Lal sold the property to the appellants-plaintiffs. That sale-deed was registered. On the 6th January, 1885, the respondents-decree-holders put in an application for execution against the property. The 20th February following was fixed for the sale. On the 20th February the appellants, acting under s. 291 of the Code of Civil Procedure, presented a petition for leave to pay the judgment-debt and costs into Court. That petition was opposed by the respondents, they raising a doubt as to the transfer. The Deputy Collector referred the case to the Court, which seems to have been close by. The application was then made to the Court, and was refused. The sale proceeded, and the decree-holders-respondents purchased on the same day. Upon that this suit was brought. The Subordinate Judge dismissed the suit, apparently on the ground that as Musammat Gaura had questioned the sale made by her, the appel-

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lants were not persons entitled to have the sale stayed by paying the money into Court. He also held that s. 244 barred the suit. This involved one question of fact and two questions of law. The question of fact was whether Musammat Gaura had sold the property to Kundan Lal. The evidence proved that she did, and had executed the sale-deed of the 18th December, 1884. When that deed was registered, she was identified by a person deputed by the Registrar for that purpose from the office. Mr. *Conlan* admits that he cannot dispute that the sale did take place. The first question of law is, whether the appellants, who were the assignees who purchased from Kundan Lal, who purchased from Musammat Gaura, were entitled to come in and protect the property by tendering the money under s. 291 of the Code of Civil Procedure. The only right of the decree-holders was to have this debt and costs paid to them, or to have the property sold to satisfy this judgment and costs. It is only as a matter of grace that a decree-holder is allowed to purchase at auction-sale at all. If the debt and costs are paid by a third person on behalf of the debtor, the decree-holder ceases to have any interest in the property, and the money so paid cannot be recovered from him. The judgment-debtor might object to the intervention of a third party, but that is not the present case. Indeed, we are strongly of opinion that if Musammat Gaura had attempted to interfere, the assignees would have been entitled to an injunction against her; and further, we think they would be entitled to use her name in paying the money into Court, because her rights had passed to her vendees. Consequently, we are of the opinion that the executing Court was bound to accept the money and stop the sale.

The only other point now remaining is, whether the case is governed by s. 244 or not. We think that the current of decisions show that s. 244 does not apply to a case like this, and that current of decisions is opposed to the doctrine in the case cited to us (1). On these grounds we decree the appeal with costs, that is to say, the appellants should have a decree conditioned on payment into Court within thirty days of the judgment-debt and costs as it stood on the 20th February, 1885, at the first stage of the sale, minus the costs of this litigation.

Appeal allowed.

(1) *Rameshandra Kolathar* v. *Mahadaji Kolathar*. I. L. R., 9 Bom. 141.

1887
June 13.

Before Mr. Justice Mahmood.

IJRAIL (DEFENDANT) v. KANHAI AND ANOTHER (PLAINTIFFS).*

Jurisdiction—Civil and Revenue Courts—Suit for partition and possession of a share in a particular plot in a patti—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 135, 241 (f).

A suit by a co-sharer in a joint zamíndári estate for partition and possession of his proportionate share of an isolated plot of land is not maintainable in a civil Court, with reference to ss. 135 and 241 of the N.-W. P. Land Revenue Act (XIX of 1873). *Ram Dayal* v. *Megu Lal* (1) distinguished.

THE plaintiffs in this case, Kanhai and Bhaggu, obtained a decree against the defendant, Ijrail, on the 14th September, 1882, declaring their proprietary right to a one-third share in a plot of land measuring 5 bighas 19 biswas, adversely to the plea of the defendant that the plot was *sir* land belonging exclusively to himself. They subsequently brought the present suit in the Court of the Munsif of Kaimganj, praying for actual partition and possession of the one-third share to which their decree had declared them entitled. The claim was described in the plaint as a claim for "possession by means of partition of a one-third share of 5 bighas and 19 biswas *pucka*." The plot in which the one-third share in suit was held was part of a patti measuring 203 bighas 11 biswas.

The defendant pleaded that partition of the plot could not be had without partition of the entire *patti*, but that partition of the entire *patti* could be claimed only in the Revenue Court, with reference to ss. 135 and 241 (*f*) of the North-Western Provinces Land Revenue Act, and that the Munsif had therefore no jurisdiction to entertain the suit.

The Munsif held that he had jurisdiction, observing as follows:—"In my opinion the plaintiffs should not be prohibited from suing in this Court, as the claim refers to a very small portion of land out of their one-third share in a *patti* of the village, and the whole *patti*, as admitted by both parties, is 203 bighas and 11 biswas *pucka*. The provisions of the Revenue Act cannot be applicable to the partition of such small portions of land. Had

* Second Appeal, No. 1060 of 1886, from a decree of W. H. Hudson, Esq., District Judge of Farukhabad, dated the 15th July, 1886, affirming a decree of Maulvi Muhammad Unwar Hussain, Munsif of Kaimganj, dated the 12th May, 1886.

(1) I. L. R., 6 All. 452.

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the plaintiff claimed his whole share of the *patti* in the village, he would have claimed it in the Revenue Court and applied for partition there. This view is supported by *Ram Dayal* v. *Megu Lal*, (1). As the claim is not only for partition but for possession of the land too, there is no reason to doubt its validity." The Munsif, after considering the suit upon the merits, passed a decree in favour of the plaintiffs.

The defendant appealed to the District Judge of Farakhabad, who gave judgment as follows:—

"I am of opinion that this case is ruled by the judgment given in the precedent cited by the lower Court, *viz.*, the case of *Ram Dayal* v. *Megu Lal* (1), and that the object sought by the plaintiffs does not require the intervention of the Collector for the purpose of giving effect to a decree previously obtained. The plaintiffs originally sued for a declaration that the plot of 5 bighas 19 biswas (now in suit) was not *sir* land belonging to the defendant, but that one-third of it belonged to them (the plaintiffs), and they obtained a decree on the 14th September, 1882. They now sue to get possession of this one-third share of this particular plot of land, and to get it by means of an actual physical partition of this plot. I do not think it was necessary for them to apply to the revenue authorities for a partition of their share in the whole estate in which they are co-parceners, inclusive of their zamíndári rights, in order to get their proportionate area of the plot in suit; and I therefore hold that they were entitled to sue in the civil Court for possession of the land which the civil Court had declared their right to. The other pleas of the appellants are futile, and the appeal is dismissed with costs."

The defendant appealed to the High Court.

Maulvi *Abdul Majid*, for the appellant.

Babu *Ratan Chand*, for the respondents.

MAHMOOD, J.—This was an action for the understanding of which the following few facts are necessary:—The subject-matter of dispute between the parties is certain land constituting an area of 5 bighas 19 biswas of land, being the aggregate area of four plots, *viz.*, Nos. 146, 337, 526, and 688 of *pukhta* or *pucka* measurement. These very plots were the subject-matter of litigation

(1) I. L. R., 6 All. 462.

between the parties upon a former occasion, in which litigation the parties being co-sharers of the land, the dispute was whether it did or did not form the private *sir* land of the present defendant-appellant, Ijrail. In that litigation Ijrail was unsuccessful, and the final decree of the 14th September, 1882, declared that the plaintiffs-respondents now before me were entitled to a one-third share in the *patti* to which these lands appertain. Having obtained that decree the plaintiffs instituted this suit with the object of having these four plots of land specifically partitioned, upon the allegation that these lands were the joint property of the parties, and that circumstances had arisen which would entitle the plaintiffs to claim a separation of the shares for which they pray. Both the Courts below, feeling themselves bound by the adjudication of the 14th September, 1882, held that the plaintiffs were entitled to the one-third share in these plots, and with reference to the ruling of this Court, to which I was a party in the case of *Ram Dayal* v. *Megu Lal* (1), those Courts have held that such a suit was entertainable by the civil Court. The main defence urged by the defendant-appellant in the Court below was that such an action virtually amounted to claiming partition of a portion of the mahál, irrespective of the other plots constituting the mahál; and he contended that although the plaintiffs were entitled to the one-third land, yet the share could not be separated in this isolated manner irrespective of the revenue law. Upon these grounds it was further contended by him that the action was not maintainable by the civil Court. This contention having been disallowed by both the Courts below, the present second appeal repeats that contention, and I am of opinion that it has force. It is admitted on all hands that the parties are co-sharers of the *patti* in which these four plots are situate, also that these plots form part of numerous other plots of land situate in that same *patti*, also that all these plots are jointly owned by the parties along with other co-sharers of the *patti*, and this being so, the prayer contained in the plaint amounts simply to asking for a partition of four plots out of many more plots included in the zamíndári property. By s. 241 of Act XIX of 1873 (the Land Revenue Act), matters of this description have been excluded from the jurisdiction of the civil Court, and the reason of the law seems to be that if isolated plots are to be

(1) I. L. R., 6 All. 462.

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brought into litigation for purposes of partition in this manner, the broad partition which can be effected only by a Revenue Court, such as is contemplated by ss. 107 to 139 of the Revenue Act, could not be properly worked. The only ruling upon which reliance is placed for the opposite view by Mr. *Ratan Chand* on behalf of the respondents is the ruling to which I have already referred. And as the judgment in that case was delivered by myself, I think I need only say that the effect of that judgment is simply to hold that when a civil Court has passed a decree whereby certain trees were to be uprooted, without specifying the exact area from where the trees were to be uprooted, the Court executing that decree (behind which decree such Court could not go) could give effect to that decree without resorting to the provisions contained in s. 265 of the Code. I do not understand that ruling to mean that any co-sharer of a joint zamíndári estate could, by suing for partition and division of isolated plots of land, bring about a state of things whereby it would (when the question arises before the Revenue Court) be extremely inconvenient, if not impossible, to duly effect a partition, such as the Revenue Act in s. 135 and in other sections contemplates. I hold therefore, that the nature of the claim set forth in the plaint in this suit, and the defence set up thereto, gave rise to a dispute of such a character as could not be entertained by a civil Court, and should have been dismissed upon this ground *in limine*. For these reasons I decree this appeal, setting aside the decrees of both the lower Courts. The plaintiffs-respondents' suit will stand dismissed with costs in all the Courts.

Appeal allowed.

1887
June 20.

Before Mr. Justice Mahmood.

NAURANG SINGH AND OTHERS (DEFENDANTS) *v.* SADAPAL SINGH, PLAINTIFF.*

Arbitration—Revocation of submission to arbitration—Appellate decree in accordance with award—Second appeal—Civil Procedure Code, ss. 508, 521, 522, 582.

By reason of s. 582 of the Civil Procedure Code, where a Court of first instance wrongly sets aside an arbitration award and passes a decree against the terms thereof, and a Court of first appeal, holding that the award was not open to

* Second Appeal, No. 928 of 1886, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 25th February, 1886, reversing a decree of Babu Nihal Chandra, Munsif of Azamgarh, dated the 18th July, 1885.

objection upon the grounds mentioned in s. 531, passes a decree strictly in accordance with the award, such appellate decree is entitled to the same finality as the first Court's decree would have been under the last paragraph of s. 522, and cannot be made the subject of second appeal. *Pureshnath Dey* v. *Nobin Chunder Dutt* (1) and *Rughoober Dyal* v. *Maina Koer* (2) dissented from.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *G. T. Spankie*, for the appellants.

Mr. *W. S. Howell*, for the respondent.

MAHMOOD, J.—Mr. *Spankie*, who has appeared on behalf of the defendants-appellants in this case, has conceded that in view of the ruling of this Court in the case of *Nainsukh Rai* v. *Umadai* (3), which followed the ruling of the Lords of the Privy Council in *Pestonjee Nussurwanjee* v. *Manockjee and Co.* (4), the first ground taken in the memorandum of appeal is not maintainable; and the learned counsel has also abandoned the third ground which appears in the memorandum of appeal. The only ground upon which he insists is the contention contained in the second ground of the memorandum of appeal; and in order to dispose of that contention it is necessary to refer to the following facts :—

The suit was for possession of certain zamíndári shares, and it was instituted in August, 1884. On the 10th January, 1885, the parties agreed to refer the matter to arbitration, and on the same day the Court of first instance made an order referring the dispute to the arbitration of the persons named in the submission. Subsequently, on the 19th January, 1885, the defendants put in an application, complaining of the arbitrators, and praying that the case might be disposed of on the merits. On the 23rd January, 1885, an order was passed by the first Court to the effect that the objections raised by the defendants were not sufficient to disturb the submission, and that the proper time for presenting such objections was after the arbitration award. That award was made on the 16th February, 1885, and the defendants presented a second application containing their objections to the award, which objections charged the arbitrators with misconduct and corruption. Those objections were allowed by the Court of first instance, without going into the evidence on the allegations, on the 26th February,

(1) 12 W. R., 93.
(2) 12 C. L. R., 564.
(3) I. L. R., 7 All., 273.
(4) 12 Moo. I. A. 130

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1885, and that Court proceeded to deal with the case upon the merits irrespective of the arbitration award of the 16th February, 1885. The result of such trial was to decree the claim in part. This decree was made on the 18th July, 1885, and from that decree an appeal was preferred by the plaintiff, and the lower appellate Court remanded the case under s. 566 of the Civil Procedure Code for inquiry as to whether the arbitration award of the 16th February, 1885, was valid with reference to the question raised by the defendants under s. 521 of the Civil Procedure Code. This order of remand was made on the 1st December, 1885, and the case going back to the Court of first instance, the defendants appear to have been served with notice calling upon them to produce evidence in the Court of first instance. But they did not do so, and the Court of first instance recorded its finding upon the issue remanded, finding that no such ground of complaint was proved as was contemplated by s. 521 of the Code, because the defendants had produced no evidence. Upon receipt of this finding the Court of first appeal held that the arbitration award of the 16th February, 1885, was not open to any legal objection; that it was valid and binding upon the parties, and holding this, that Court passed a decree in accordance with the terms of that award, thereby decreeing the whole claim of the plaintiff-respondent.

From that decree this second appeal has been preferred, and Mr. *Howell*, on behalf of the respondent, contends that the appeal does not lie, because under the last part of s. 522 of the Civil Procedure Code, the decree passed by the lower appellate Court, being in accordance with the award, is non-appealable. On the other hand, Mr. *Spankie*, relying upon the ruling of the Calcutta Court in the case of *Pureshnath Dey* v. *Nobin Chunder Dutt* (1), which was followed in the case of *Rughoobur Dyal* v. *Maina Koer* (2), contends that because the decree of the first Court was not in accordance with the arbitration award, the mere circumstance that the decree of the lower appellate Court reversing the decree of the Court of first instance gives effect to such award will not preclude the right of second appeal which would otherwise exist under the law. Then the learned counsel further argues that the Court of first instance, to which the case

(1) 12 W. R. 93. (2) 12 C. L. R. 564.

was remanded under s. 566 of the Code, did not allow sufficient time to the defendants-appellants for producing evidence to prove the corruption and misconduct of the arbitrators, as they alleged in their petition of objections of the 18th February, 1885, and that therefore the non-production of evidence was matter to be dealt with as such, with reference to the allegations contained in the defendants-appellants' application of the 13th February, 1886, where they stated that one of the petitioners had been seriously ill, and the other was taking care of the other appellant, and that only five days were allowed for production of evidence. I am of opinion that both the rulings upon which Mr. *Spankie* has relied support his contention. But with due respect for the views of the learned Judges who decided those cases, I find myself unable to hold that the provisions of s. 521 or s. 522 of the Code are to be limited either to the Court of first instance or to the Court which makes the order referring the case to arbitrators. In neither of the rulings relied upon are there any reasons given for holding that those provisions are not available to the Court of appeal. It is conceded that if the Court of first instance in this case had disallowed the objections to the arbitration award taken by the defendants, and had passed a decree in accordance with the arbitration award, such a decree would have been final, under the last part of s. 522 of the Civil Procedure Code. What is contended is that a Court of first appeal when, in exercising its power as a Court of appeal empowered to deal with the merits, it does exactly what, if the Court of first instance did, would render the decree of that Court final, the decree of such appellate Court is not exempt from appeal under the last part of s. 522 of the Code. I am of opinion that the provisions of the whole of ss. 521 and 522 of the Code are applicable to the Court of first appeal by reason of the provisions of s. 582 of the Civil Procedure Code, and that when a Court of first instance wrongly sets aside an arbitration award, and passes a decree against the terms of such award, and a Court of appeal dealing with the merits of the case comes to the conclusion that the award was not open to any such objections as are contemplated by s. 521 of the Code, and upon that finding passes a decree strictly in conformity with the terms of such arbitration award, such decree of the Court of first appeal is entitled to the same

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finality as a decree of the first Court would have been entitled to under the last part of s. 522 of the Code. This view seems to be supported by the fact that whilst cls. 25 and 26 of s. 588 of the Civil Procedure Code allow appeals from orders superseding an arbitration or modifying an award, no such appeal is allowed from orders passed under s. 521, disallowing objections to arbitration awards. The decree of the learned Judge of the lower appellate Court is, therefore, a decree which is in conformity with the award, because the judgment, of which it is the result, rejects the objections which were raised against such award under s. 521 of the Code. The decree is, therefore, final, and cannot be made the subject of second appeal any more than the decree of the first Court could have been made the subject of the first appeal if it had rejected the objections against the arbitration award and conformed with the requirements of s. 522 of the Civil Procedure Code.

The Code throughout gives to the Court of appeal all the powers that the Court of first instance has in connection with litigation; and if the question did arise as to the questions of minor detail, I should probably hold that the Court of first appeal has all the powers of a Court of first instance in dealing with references to arbitration, and disposing of objections to arbitration awards.

For these reasons I hold that the decree from which this appeal has been preferred is a final decree, and could not be appealed from; and this view, dissenting as it is from the rulings cited by Mr. *Spankie*, renders it unnecessary for me to consider the question whether, under the circumstances of this case, the lower Courts acted rightly in not allowing to the defendants-appellants further time for producing evidence to substantiate the objections contained in the application of the 18th February, 1885, in respect of the corruption or misconduct of the arbitrators. I dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Edge Kt., Chief Justice, and Mr. Justice Tyrrell.

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June 27.

SHITAB DEI AND OTHERS (PLAINTIFFS) *v.* AJUDHIA PRASAD AND OTHERS (DEFENDANTS).*

Landholder and tenant—Notice of ejectment—Determination of tenancy—Act XII of 1881 (N.-W. P. Rent Act), ss. 36, 39 (c), 40—Suit for ejectment and mesne profits—Payments by wrong-doer in possession not to be deducted from such profits.

S. 39 (c) and s. 40 of the N.-W. P. Rent Act (XII of 1881) imply that if a landholder has failed to give his tenant the written notice of ejectment required by s. 36, the tenancy is not to be treated in law as having ceased on determination of the term provided, but is to be treated as still subsisting.

Where upon the expiry of the term of a lease, but without the written notice of ejectment required by s. 36 of the Act having been given by the lessor, possession was taken and rents collected by persons claiming under a subsequent lease,—*held* that the tenancy of the first lessees did not cease upon the determination of the term of their lease, that the second lessees were wrong-doers in usurping possession and collecting rents and profits, and were liable in a suit for damages by way of mesne profits after deduction of a sum paid by them for Government revenue, but without deduction of what they had paid the lessor or of the expenses they had incurred in collecting the rents.

THE plaintiffs in this suit held certain lands under a lease which determined in 1289 fasli. Their lessor granted a lease to the defendants for a term commencing in 1290 fasli, and on the 15th October, 1882 the defendants took possession, demanded rents from the sub-tenants and received the rents and profits. The lessor had not given to the plaintiffs the written notice of ejectment required by s. 36 of the N.-W. P. Rent Act (XII of 1881). The plaintiffs subsequently obtained from the Revenue Court an order putting them in possession, to which the defendants and the lessor were parties. The plaintiffs then brought the present suit for mesne profits in respect of rents and profits received by the defendants subsequently to the 15th October, 1882.

The Courts below (Subordinate Judge and District Judge of Moradabad) dismissed the claim, on the ground that the plaintiffs' lease had determined prior to the period for which mesne profits were claimed, and that the omission to issue notice of ejectment under s. 36 of the Rent Act was under the circumstances immaterial. The plaintiffs appealed to the High Court.

* Second Appeal, No. 984 of 1886, from a decree of W. C. Watts, Esq., District Judge of Moradabad, dated the 3rd March, 1886, confirming a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 12th July, 1886.

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SHITAB DEI v. AJUDHIA PRASAD.

The Hon. Pandit *Ajudhia Nath* and Babu *Ratan Chand*, for the appellants.

Munshi *Hanuman Prasad*, Pandit *Sundar Lal*, and Lala *Lalta Prasad*, for the respondents.

EDGE, C. J., (after stating the facts as above, continued):—It is contended that on the determination of the term in 1289 fasli the tenancy also determined. The Rent Act must be looked at to see if this contention is well founded. S. 36 of the Rent Act enacts that if the landholder desires to eject a tenant holding only for a limited period after the determination of his tenancy, he shall cause a written notice of ejectment to be served on the tenant under the provisions of the Act. SS. 37 and 38 provide for the contents and method of serving such notice, and s. 39 gives the tenant a right within thirty days after the service of notice to contest his liability to be ejected, and provides the tribunal to determine such questions. Sub-clause (*c*) of s. 39 enacts that upon the determination of such questions adversely to the tenant or where no application under that section has been made, the "tenancy of the land in respect of which notice has been served shall cease." The only construction I can put on the section is that if the landlord has failed to give the notice required by s. 36, the tenancy is not to be treated in law as determined on the determination of the term provided by the lease, but is to be treated as subsisting. S. 40, I think, also leads to the same conclusion. Under these circumstances I am of opinion that the tenancy did not determine on the determination of the term granted by the lease, and the defendants were wrong-doers in usurping possession and taking the rents and profits of the lands. The only question remaining is as to damages. It is admitted that the defendants have received Rs. 3,126. It is also admitted on both sides that Government Revenue, Rs. 1,147-13-10, has been paid, leaving a balance of Rs. 1,978-2-2. The defendants say that they have paid the landlord Rs. 875 and have incurred costs of collection of the rents. The Rs. 875 were not paid at the request of, or on behalf of, the plaintiffs; they were paid by the defendants on their own behalf wrongly out of the moneys with which the defendants had no legal or equitable right to intermeddle. The payment, if made, is no answer to the plaintiff's claim. The plaintiffs say: You have wrongfully and in violation of my right

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received Rs. 3,126. The defendants cannot claim, being tort-feasors, to deduct the costs of the collection of money they have wrongfully collected. I am of opinion that the plaintiffs-appellants are entitled to a decree for Rs. 1,978-2-2 *plus* interest thereon at the rate of 12 per cent. per annum from the 17th February, 1883, to the date of this decree, and with costs here and below, and 6 per cent. on the amount of this decree and costs until realization.

TYRRELL, J.—I entirely concur.

Appeal allowed.

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July 5.

Before Mr. Justice Mahmood.

MATUK DHARI SINGH (JUDGMENT-DEBTOR) *v.* ALI NAQI AND OTHERS (DECREE-HOLDERS).*

Occupancy tenancy—Sale by occupancy-tenant—Decree in favour of zamindar against purchaser for mesne profits—Mesne profits how to be assessed.

Where in a suit against an occupancy tenant and his vendee, the zamindár obtained a decree for cancelment of the deed of sale, for possession of the land by ejectment, and for mesne profits from the date of suit to the date of recovery of possession,—*held* that the mesne profits awarded must be assessed as damages against the vendee as a trespasser, and that the proper measure of such damages was not the rent which was payable by the vendor, but the actual market-value of the land for the purposes of letting.

The facts of this case are sufficiently stated in the judgment of the Court.

Kunwar *Shivanath Sinha* and Munshi *Kashi Prasad*, for the appellant.

Mr. *Niblett* for the respondents.

MAHMOOD, J.—In arguing this appeal, Mr. *Kashi Prasad*, who has appeared on behalf of Mr. *Shivanath Sinha*, has not pressed the second, third, and the fourth grounds of appeal, and has confined his argument to the first and the fifth grounds of appeal. I need not therefore deal with the case beyond the scope of these grounds in the memorandum of appeal.

The facts necessary to elucidate the questions raised are that one Jageshar and Musammat Abhlakhi were occupancy-tenants of the land to which this suit relates, and on the 20th February, 1882,

* Second Appeal, No. 143 of 1887, from a decree of W. J. Martin, Esq., District Judge of Mirzapur, dated the 10th January, 1887, modifying a decree of Munshi Shankar Lal, Munsif of Mirzapur, dated the 24th September, 1886.

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they executed a sale-deed whereby they conveyed their occupancy tenure to Matuk Dhari Singh, the present appellant before me. Thereupon the present respondents, who are zamíndárs of the village, sued the vendors and the vendee for the cancellation of the deed of sale, and also for possession of the land, but the prayer for ousting was limited to the ejectment of the vendee on the ground that the sale-deed under which he had purchased the tenure was illegal, by reason of the prohibition contained in s. 9 of the Rent Act. The suit was instituted on the 26th May, 1883, and the plaint included a prayer that the future mesne profits might be awarded as against the defendant-vendee, who was, according to the contention in the plant, a trespasser upon the land by reason of the invalidity of the sale-deed under which he had entered into possession. The suit was decreed on the 17th January, 1884, but the decree by some oversight did not contain any award as to the future mesne profits claimed in the suit. This circumstance led to an application for amendment of the decree, and the application was granted on the 15th January, 1886, whereby, in awarding the remedy, the decree specified that the plaintiffs who had succeeded were also to realize future mesne profits in respect of the land to which the suit related.

The decree having been so amended, the plaintiffs, decree-holders-respondents before me, obtained possession of the land, and on the 28th May, 1886, they presented the present application for execution of their decree for the purpose of realizing future mesne profits as the amended decree awarded.

The application was resisted upon the grounds, *inter alia*, that the future mesne profits to which the decree related referred only to a period subsequent to the date of the decree, and not to the period intervening between the institution of the suit and the passing of the decree; and, in the next place, that the amount of mesne profits claimed by the decree-holder was excessive.

The decree-holders had claimed in their application for execution Rs. 369-6 as mesne profits for the year 1291 fasli; but the lower appellate Court has found that the sum was extravagant, and that the real letting market value of the land would be Rs. 148-8, and this sum that Court has allowed as the proper amount

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of mesne profits to which the respondents-decree-holders were entitled under the decree. The lower appellate Court has also held that the period to which such mesne profits related was the period from the date of the institution of the original suit up to the date when the decree-holders obtained possession of the land under the decree. The order of the lower appellate Court gives effect to these views, and it is from that order that this second appeal has been preferred to this Court.

The contention of the parties before me raises two questions for determination :—

1. Whether the future mesne profits awarded by the decree of the 17th January, 1884, as amended on the 15th January, 1886, are to be calculated for the period between the date of the suit up to the actual possession, or is limited to the interval between the passing of that decree and the date of possession of the decree-holders under that decree.

2. Whether in the assessment of mesne profits as damages for the purposes of ss. 211 and 212 of the Code, the mesne profits to be awarded are to be represented by such rents as the occupancy tenants, Jageshar and Musammat Abhlakhi, paid to the zamindárs, decree-holders, before the sale-deed of the 20th February, 1882, or by the actual market value of the land for the purposes of letting.

Upon the first point, having considered the matter, I am of opinion that the future mesne profits, which the decree awarded, relate to the whole period intervening between the date of the suit and the date of possession. This view is the same as that taken by the learned Judge of the lower appellate Court. But upon this point it is ingeniously argued by Mr. *Kashi Prasad* on behalf of the appellant, that the application of the 28th May, 1886, which prayed for execution of the decree and mesne profits claimed, contained the Hindustani words "*sar kharcha wa wasilat mabad digri*," that is to say, the costs and mesne profits subsequent to the passing of the decree of the 17th January, 1884. The original application, which is now before me, contains some words of amendment which seem to have been hurriedly made by the decree-holders' pleader, and which may possibly bear the interpre-

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tation upon which Mr. *Kashi Prasad* insists. But having considered the matter, I think that the Hindustani words may be so read as to render the expression applicable to future mesne profits, calculated, not from the date of the decree, but from the date of the institution of the suit, namely, 26th May, 1883.

As to the second point, I confess I have had some difficulty in deciding the question because of a *dictum* in an unreported case decided by a Division Bench of this Court. But that case is not on all fours with the present, and I do not think it precludes me from expressing my own views as to the matter of the assessment of mesne profits. What is contended is, that according to law in a case of this kind the measure of damages when claimed as mesne profits is the rent which the zamíndár could have realized from the occupancy tenants who have, by reason of an illegal sale, placed the vendee in possession, and that the amount of such damages should not be assessed upon any other principle. It is perfectly true that if the vendors of the deed of the 20th February, 1882 had never executed that deed, and had continued in possession of their occupancy holding, the plaintiffs-zamíndárs could not realize more than the rent due by those occupancy-tenants; but it does not follow therefrom that such rent is the measure of damages. When such damages are claimed against a person who, by taking an illegal sale from such occupancy-tenants, acquires possession of the land, and, as such, holds possession, his position is no better than that of a trespasser. In this case the question has been pressed, because, whilst the decree-holders claimed no less than Rs. 369-6 as the amount of mesne profits, the learned Judge of the lower appellate Court has fixed such mesne profits to amount only to Rs. 148-8, and the rent payable by the occupancy-tenants-vendors is only Rs. 37-3.

It has been ruled by me in the case of *Debi Prasad* v. *Har Dyal* (1) that the act of an occupancy-tenant in making a transfer which would be void under the law as contained in s. 9 of the Rent Act, is not such an act as would involve forfeiture of the tenure and ejectment of the occupancy-tenant under cl. (*b*) of s. 93 of the Rent Act. The view there expressed has been approved by the present learned Chief Justice of this Court in the case of *Fatima*

(1) I. L. R., 7 All. 691.

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Begam v. *Hansi* (1), and has since been adhered to by me in the more recent case of *Mul Chand* v. *Pitam* (2); but those views relate more to a case in which the zamíndár, in consequence of an invalid transfer made by an occupancy-tenant, seeks to oust such tenant by process of the Rent Court, than to a case of this kind, where a decree has already been made, rightly or wrongly, in a regular suit awarding possession to the zamíndárs of the holding of an occupancy-tenant, which holding such tenant had invalidly sold. As a Court executing the decree cannot go behind the decree itself, I must take it that the decree now sought to be executed was a decree properly passed, though I am not prepared to express any opinion as to whether the effect of that decree is to terminate the occupancy tenure of Jageshar and Musammat Abhlakhi. So far as the immediate question now under consideration is concerned, it seems to me that the mesne profits awarded must be assessed as damages against the present appellant with reference to his character of having been in possession under an invalid sale-deed, and thus a trespasser upon the land. It seems to me that the proper measure of damages is not the rent which was payable by the occupancy-tenant to the zamíndár, a rent subject to its own peculiar statutory limitations, but the proper market value of the land for the purposes of leasing. That value has been found to be Rs. 148-8 per annum; and this sum, therefore, represents the loss occasioned by the wrongful act of the present appellant in getting into possession of the land under an invalid sale-deed from the occupancy-tenants.

For these reasons, agreeing with the conclusions at which the learned Judge of the lower appellate Court has arrived, I dismiss this appeal with costs.

Appeal dismissed.

(1) I. L. R., 9 All. 244.

(2) S. A. No. 1151 of 1886, decided on the 28th June, 1887.

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July 9.

Before Mr. Justice Mahmood.

KALKA PRASAD (PLAINTIFF) *v.* CHANDAN SINGH AND OTHERS (DEFENDANTS).*

Hypothecation—Registration—"Moveable Property"—Act I of 1868 (General Clauses Act), s. 2 (6)—Act III of 1877 (Registration Act), ss. 2, 17—Act IV of 1882 (Transfer of Property Act), ss. 3, 54—Small Cause Court suit—Suit for enforcement of hypothecation against moveable property—Act XI of 1865 (Small Cause Courts Act), s. 6—Transfer of debt—Act IV of 1882, s. 131—Notice to debtor.

Held that an assignment by endorsement of a registered bond hypothecating certain crops was a transaction relating to moveable property, and registration of such endorsement was not required by s. 17 of the Registration Act (III of 1877) or s. 54 of the Transfer of Property Act (IV of 1882); and that a suit by the assignee to enforce the hypothecation was not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, in which a second appeal would be barred by s. 586 of the Civil Procedure Code. *Surajpal Singh* v. *Jairamgir* (1) followed. *Ram Gopal Shah* v. *Ram Gopal Shah* (2) and *Appavu Pillai* v. *Subraya Muppen* (3) referred to.

Held also that the assignment was not void by reason that notice thereof was not proved to have been given to the obligor, inasmuch as the effect of s. 131 of the Transfer of Property Act was merely to suspend the operation of the assignment up to the time when such notice was received; that in this case the assignment would come into operation against the obligor when he became aware of it by the institution of the suit; and that if he had prior notice, and sold the property to *bond-fide* transferees for value without notice either of the charge created by the bond or of the assignment, such transferees would be protected from liability. *Lala Jugdeo Sahai* v. *Brij Behari Lal* (4) referred to.

THE facts of this case were as follows:—Chandan Singh, defendant No. 1, executed a deed in lieu of Rs. 100 in favour of Muhammad Husain Khan, defendant No. 2, on the 17th July, 1885, and as collateral security hypothecated certain property described in the deed as "*Kh.t-naishakar*" (literally, "a field of sugar cane"). The deed was duly registered, and subsequently, on the 13th October, 1885, the obligee of the bond, Muhammad Husain Khan, defendant No. 2, made an endorsement on the deed purporting to sell or assign the bond to Kalka Prasad, the plaintiff-appellant in this case. The endorsement was, however, neither stamped nor registered.

* Second Appeal, No. 1429 of 1886, from a decree of Maulvi Mirza Abid Ali Khan, Subordinate Judge of Shahjahánpur, dated the 30th June, 1886, confirming a decree of Maulvi Muhammad Shafi, Munsif of Shahjahánpur, dated the 8th April, 1886.

(1) I. L. R., 7 All. 855.
(2) 9 W. R., 130.
(3) 2 Mad. H. C. Rep. 474.
(4) I. L. R., 12 Calc. 505.

In the meantime Chandan Singh cut down the crops of sugar-cane and sold the same to Mendu Khan, defendant No. 3, and Imam Ali, defendant No. 4.

The present suit was commenced by the plaintiff on the 2nd March, 1886, having for its object the recovery of the money due upon the bond of the 17th July, 1885, either from Chandan Singh, defendant No. 1, or his vendees, defendants Nos. 3 and 4, who had purchased the sugar cane. The suit was met by the plea that the endorsement of the 13th October, 1885, being unregistered, could not have transferred the bond to the plaintiff, and this view having been accepted by the Court of first instance (Munsif of Shâhjahânpur), the suit was dismissed by that Court without going into the evidence. That Court regarded the bond of the 17th July, 1885 as one hypothecating immoveable property, and, as such, requiring registration under s. 17 of the Registration Act (III of 1877), the absence of such registration vitiating the sale itself under s. 54 of the Transfer of Property Act (IV of 1882). On appeal, the lower appellate Court (District Judge of Shâhjahânpur) not only upheld this view, but held that the sale was in itself invalid by reason of the fact that the obligee of the bond of the 17th July, 1885, Muhammad Husain, in transferring it to the plaintiff, Kalka Prasad, never gave notice to the obligor Chandan Singh, and that therefore the transfer was bad with reference to the provisions of s. 131 of the Transfer of Property Act.

The plaintiff appealed to the High Court. The further facts of the case, and the arguments on both sides, sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Lala *Lalta Prasad*, for the respondents.

MAHMOOD, J. (after stating the facts as above, continued):—Pandit *Sundar Lal*, in supporting this second appeal, has contended in an able argument that the judgments of both the lower Courts are erroneous, because, in the first place, what was hypothecated in the bond of the 17th July, 1885, was not the land, but only the sugar cane crop of the field, and the hypothecation therefore related only to moveable property within the meaning of cl. (6) of s. 2 of the General Clauses Act (I of 1868), and s. 3 of the Registratio

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Act (III of 1877), and s. 2 of the Transfer of Property Act (IV of 1882), and that therefore no registration of the document was required either by s. 17 of the Registration Act, or s. 54 of the Transfer of Property Act, so far as the endorsement of the 13th October, 1885, transferring the bond to the plaintiff, was concerned.

Before proceeding further, I may at once say that no question arises as to the absence of stamp upon that endorsement, because a penalty thereon has already been taken under s. 34 of the Stamp Act, and the validity of such penalty cannot be questioned in appeal at this stage under the same section.

A preliminary objection has been taken by Mr. *Lalta Prasad*, on behalf of the respondents, to the hearing of this appeal, upon the ground that even if the appellant's contention in this Court be valid, and the property hypothecated in the bond now sued upon be taken to be only the crops, and, as such, moveable property, no such suit can be made the subject of second appeal, as it is of the nature of a Small Cause Court suit within the meaning of s. 586 of the Civil Procedure Code; and, in support of this contention, the learned pleader relies upon a ruling of the Madras High Court in *Appavu Pillai* v. *Subraya Muppen* (1), where Scotland, C. J., and Holloway, J., said:—"There is nothing, in our opinion, in the Small Cause Courts Act to prevent the pledgee enforcing his security on moveable property. The Court, having jurisdiction in a suit for the recovery of such property, has clearly jurisdiction to enforce a contract pledging such property." On the other hand, Pandit *Sundar Lal* contends that the suit is not of the nature of the Small Cause Court suit contemplated by s. 6 of Act XI of 1865, and in support of this view he cites the case of *Ram Gopal Shah* v. *Ram Gopal Shah* (2), and also a recent ruling of this Court in *Surajpal Singh* v. *Jairamgir* (3), where my brethren Straight and Tyrrell concurred in holding that a suit which sought to recover a sum of money by enforcement of hypothecation of certain cattle by their attachment and sale was a suit not cognizable by the Small Cause Court, and, as such, could be made the subject of an appeal.

(1) 2 Mad. H. C. Rep., 474. (2) 9 W. R., 136.
(3) I. L. R., 7 All. 855.

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In this state of authority, before I can consider the remaining part of the case, I have to determine first:—Whether the bond of the 17th July, 1885 hypothecated the sugar cane crops only or also the land; secondly—If the hypothecation related only to the crops, whether the present appeal is maintainable at all as a second appeal, within the meaning of s. 586 of the Civil Procedure Code, considering that the amount claimed is below Rs. 500.

Upon the first of these questions, I am of opinion, having read the original deed, that what was intended to be hypothecated was not the field itself, but only the crops of that field, and Pandit *Sundar Lal's* contention is sound that such crops are moveable property, and that the deed, therefore, did not require registration. It seems to me that in the expression '*khet-naishakar*," the word *khet*, which means field, was intended to indicate simply a measure such as in the expression "a pint of milk:" the pint is used simply as a measure, and not as a physical pint by which such measurement is made. "*Khet-naishakar*" means the particular field specified in the deed whereon the *naishakar* or sugar cane which was hypothecated under the bond was standing.

This conclusion is supported by the circumstance that Chandan Singh is only a tenant in the village, the present plaintiff is representing the zamíndár in that same village, and the executant of the bond was not to be expected to be dealing with the field or hypothecating the land. This being so, the hypothecation was of moveable property and not of immoveable property.

As to the second question, I have already cited the somewhat conflicting rulings upon which the learned pleaders for the parties have relied, and without expressing any personal opinion of my own upon the particular question, I need only say that, sitting here as a single Judge, I do not think I should, without very strong reasons to the contrary, depart from a Division Bench ruling of this Court, such as that of my brothers Straight and Tyrrell, in *Surujpal Singh* v. *Jairamgir* (1), and I therefore follow it and hold that this was not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, and that, therefore, this second appeal did lie to this Court, notwithstanding the provisions of s. 586 of the Civil Procedure Code.

(1) I. L. R., 7 All. 855.

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I now proceed to deal with the case itself, having taken cognizance of it in second appeal. In doing so I have to consider the provisions of Chapter VIII of the Transfer of Property Act (IV of 1882). I have already shown that the Court of first instance was wrong in dismissing the suit simply for want of registration of the endorsement of the 13th October, 1885, whereby the bond of the 17th July, 1885 was sold to the present plaintiff. The lower appellate Court's view virtually amounts to holding that the plaintiff, not having proved that he or his vendor gave notice of the transfer to the debtor Chandan, the transfer itself was void. This view seems to me to be erroneous in law. In the common law of England the assignee of a debt was in old days bound to sue in the name of his assignor, a procedure which was inconsistent with the fact of the transfer, and inconsistent also with the rules of equity applicable to such matters.

What the doctrines of equity required was that a debtor, when the obligation which he owed to his obligee had been transferred by the latter to another person, should be entitled to a notice of such transfer in order to be protected from having to pay the money in fulfilment of the obligation over again to the assignee, after having paid to the original assignor. That rule has found formulation in our statute law in s. 131 of the Transfer of Property Act, which says: —"No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to, or otherwise aware of, such transfer, and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of a transfer, with the debt or property shall be valid as against such transfer."

This is the quintessence of what Courts of equity in England have repeatedly held, and the effect of this section is clear enough, and it would govern the transfer of the bond of the 17th July, 1885, under the endorsement of the 13th October, 1885, purporting to sell the same bond to the present plaintiff. It is necessary to bear in mind in the first place, that although this section expressly renders necessary the giving of express notice to the debtor, and although it suspends

the operation of such a transfer as against such a debtor up to the time when such notice is given to the debtor, it contains no provisions invalidating such transfer when no such notice is given. That is to say, in other words, there is nothing in this section which would justify the contention that the transfer is *ab initio* void for want of such notice as that section contemplates.

All that that section requires is that when an obligation is transferred by the obligee to another person, the obligor who has to fulfil such obligation is not to be subject to any liability thereunder at the instance of the transferee without such debtor having received notice of the transfer. As to the notice itself, the section does not limit that to "express notice," but to the broader doctrine of notice as understood in equity, because the words of the section are:—"unless he is a party to or otherwise aware of such transfer." The last phrase is broad enough to bring under the purview of the section all cases in which the knowledge of the transfer in an ascertainable form has reached the debtor. The latter part of the section is, of course, intended to protect a debtor who, without knowledge of the transfer of the obligation by the obligee to another person, fulfils the obligation, and is subsequently sued by the assignee of such an obligee as fraudulently accepts the fulfilment notwithstanding such assignment; and the same rule is also applied to persons other than the debtor himself, and those who, being *bonâ-fide* persons, acquire rights or any beneficial interest in moveable property in the absence of any kind of notice of the transfer of the debt by the original obligee to another person.

These views are applicable to the present case; because the mere absence of any express notice to Chandan on the one hand would not vitiate the endorsement of the 13th October, 1885, whereby the bond was sold to the present plaintiff, Kalka Prasad, although the operation of such transfer, as against Chandan, would be regulated in accordance with the time when the said Chandan obtained knowledge as to such transfer. Similarly, even if Chandan had notice of the transfer, and sold the moveable property subject to the plaintiff's bond to Mendu Khan, defendant No. 3, and Imam Ali, defendant No. 4, these two persons in the position of *bonâ-fide* transferees for value without notice either of the charge

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which the bond of the 17th July, 1885 may have created upon the crops or of the transfer of that bond in favour of the plaintiff, would undoubtedly be protected from any liability arising out of the action of Chandan in selling the sugarcane to them under such circumstances.

But the pleadings of the parties in this case raised questions of fact which required determination before the case could have been finally disposed of. First of all it was pleaded by Chandan Singh, the original obligor of the bond of the 17th July, 1885, that he had paid up the amount due under the bond to the original obligee, Muhammad Husain, and that the transfer of the 13th October, 1885 was not a real but simply a colourable transaction in which no consideration passed, and that Kalka Prasad was not the real purchaser of the bond, and, as such, not entitled to maintain the action. There was no allegation as to any information having been given to Chandan Singh in respect of the alleged transfer, and the suit appears to have been brought without any kind of notice having been issued as required by s. 131 of the Transfer of Property Act.

The lower Courts, however, taking the erroneous view of law which they have done in the case, have not gone into the merits. The view of the lower appellate Court as to the absence of notice is itself based upon a misapprehension of the interpretation of s. 131 of the Transfer of Property Act. I have already said that that section does not vitiate the transfer of a debt, but that it only postpones its operation in accordance with the date of the knowledge of such transfer reaching the debtor. In a recent case, *Lala Jugdeo Sahai* v. *Brij Behari Lal* (1), a Division Bench of the Calcutta High Court had to consider the exact effect of that section, and the learned Judges there held, in conformity with the cases cited in White and Tudor's Leading Cases, 4th edition, Vol II, pp. 776-777, as notes to the leading case of *Ryall* v. *Rowles* that whilst notice is not a condition precedent to the validity of a transfer of a debt such as contemplated by s. 131 of the Transfer of Property Act, the section only fixes the time with reference to notice when such transfer would come into operation as against

(1) I. L. R. 12 Calc. 505.

the debtor. The case before the learned Judges was one where an assignee of a mortgagee brought a suit on the mortgage against the mortgagor and the mortgagee, and no notice of the assignment had been given to the mortgagor under s. 131 of the Transfer of Property Act. The learned Judges held that the Court was wrong in dismissing the suit merely on the ground that no notice was served, as after the suit was instituted the mortgagor became aware of the assignment, and the transfer accordingly came into operation on the date when he thus became aware of it. I agree in this view of the law, and I hold that in the present case the mere absence of an express notice having been served by the plaintiff would not render the action unmaintainable.

Under these circumstances, I hold that neither of the Courts below has tried the case upon the merits, and in my opinion the proper course is to decree this appeal, to set aside the decrees of both the lower Courts, and to remand the case for trial *de novo* on the merits, with reference to the observations which I have made. The remand will be under s. 562 of the Civil Procedure Code, and under the last part of that section I may point out that the Court should try, in the first place, whether the assignment of the 13th October, 1885 was a real and genuine assignment or not: and in the second place, whether Chandan Singh actually had paid the money due on the bond of the 17th July, 1885 to Muhammad Husain, either before such assignment or thereafter at a time when he had no notice of the assignment. Thirdly, whether the defendants Mendu Khan and Imam Ali, Nos. 3 and 4, had no notice either of the sugarcane crops being hypothecated under the bond of the 17th July, 1885, or of that bond having been transferred by Muhammad Husain to the present plaintiff, and whether their action in purchasing the crops was *bonâ fide* or not.

The costs will abide the result.

Issues remitted.

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July 12.

Before Mr. Justice Mahmood.

MUHAMMAD ABDUL HAI AND ANOTHER (PLAINTIFFS) *v.* SHEO BISHAL RAI (DEFENDANT).*

Practice—Remand by lower appellate Court under Civil Procedure Code, s. 566—No objections filed by plaintiffs under s 567—Objections raised for the first time in second appeal by plaintiffs—Such objections not entertainable.

Objections which might have been, but were not, made under s. 567 of the Civil Procedure Code in a lower appellate Court to the findings on remand of the Court of first instance cannot be raised for the first time as grounds of second appeal from the lower appellate Court's decree.

The facts of this case are sufficiently stated in the judgment of Mahmood, J.

Shah *Asad Ali*, for the appellants.

Lala *Juala Prasad*, for the respondent.

MAHMOOD, J.—This was an action for recovery of rent, and was dealt with by the Court of first instance in a judgment dated the 16th February, 1885, the effect of which was to decree the claim in part. From that decree the plaintiffs appealed to the lower appellate Court, and that Court, by an order dated the 4th September, 1885, remanded the case under s. 566 for findings on no less than nine issues. The Court of first instance, in an elaborate order of the 8th January, 1886, recorded findings upon these issues, and re-submitted these to the lower appellate Court. To these findings no objection was taken by the present plaintiffs-appellants, but the defendant-respondent before me took objections, and the learned Judge of the lower appellate Court, in dealing with them, disallowed them for the reasons stated in his judgment, and upholding the findings of the Court of first instance, dismissed the appeal on the 29th May, 1886.

This appeal has been preferred, not by the defendants, whose objections to the findings of the first Court were disallowed by the Judge of the lower appellate Court, but by the plaintiffs, who never took any objections at all to the findings of the first Court upon remand. The grounds now urged are such as might have been taken as objections, under s. 567 of the Code, to the findings of the

* Second Appeal, No. 1691, from a decree of G. J. Nicholls, Esq., District Judge of Ghâzipur, dated the 4th September, 1885, confirming a decree of J. E. Gill, Esq., Assistant Collector of Ghâzipur, dated the 16th February, 1885.

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Court of first instance upon remand. These objections never having been urged before the lower appellate Court, that Court has naturally not dealt with these points, taking it for granted that the present plaintiffs-appellants had no objections to urge.

Under these circumstances I do not think that, hearing this appeal as a second appeal, I can for the first time allow these objections to be taken here as grounds of second appeal.

The appeal is dismissed with costs.

Appeal dismissed.

1887
July 21.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

LACHMAN DAS (PLAINTIFF), *v.* CHATER AND ANOTHER (DEFENDANTS).*

Administration-bond—Breach of condition—Compensation—Act X of 1865 (Succession Act), ss. 256, 257—Act IX of 1872 (Contract Act), s. 74, exception.

An administration-bond executed by an administrator in accordance with s. 256 of the Succession Act is not an instrument of the kind referred to in the exception to s. 74 of the Contract Act, so as to make the obligor liable, upon breach of the condition thereof, to pay the whole amount mentioned therein; and an assignee of the bond under s. 257 of the Succession Act cannot recover more damage than he proves to have resulted to himself or to those interested in the bond.

Held therefore, where neither the assignee of such a bond nor any one else had suffered any damage by reason of the breach of a condition requiring the obligor to file an inventory of the estate within a specified period, that the assignee was not entitled to recover from the obligor any compensation in respect of such breach.

THE facts of this case were as follows:—On the 23rd January, 1883, one Marcar Chater took out letters of administration to the estate of one J. R. Shircore, and on the same date executed an administration-bond in favour of the District Judge of Agra, in accordance with the provisions of s. 256 of the Succession Act (X of 1865). One John Owen joined in the execution of the bond as surety. The amount of the bond was Rs. 7,000; and the executants made themselves jointly and severally liable to the District Judge of Agra for the time being, engaging for the due collection and administration of the estate according to law, and to make a true inventory of the estate and to exhibit the same in the District Court on or before the 22nd January, 1884.

* First Appeal, No. 106 of 1886, from a decree of Babu Promoda Charan Banerji, Subordinate Judge of Agra, dated the 17th March, 1886.

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Application was subsequently made to the District Judge by certain creditors of the estate, namely, the plaintiff, Seth Lachman Das, Chotay Lal, Nand Ram, and Hardwar Nath, under s. 257 of the Succession Act, representing that the engagement to file the inventory on or before the 22nd January, 1885 had not been kept; and by an order dated the 15th June, 1885, the Judge assigned the bond to the plaintiff, Seth Lachman Das, on the ground that the conditions of the bond had been broken in the following respects:—(i) that the inventory had not been exhibited within the time prescribed, (ii) that accounts had not been properly presented, (iii) that the assets had not been applied within a reasonable time to the satisfaction of the claims of creditors. The plaintiff then brought the present suit against Chater and Owen, to recover "for himself and as trustee for all persons interested in the estate of the deceased," Rs. 7,000, the amount of the bond. The suit was instituted in the Court of the Subordinate Judge of Agra on the 5th December, 1885. Meanwhile, on the 4th February, 1885, the defendants had filed the inventory of the estate in the Court of the District Judge.

The defence was in effect that the engagements of the bond had been substantially fulfilled, that the estate had been duly administered and all the debts paid except that of the plaintiff and one other creditor who had refused to accept the dividends offered to them, that the entire assets were Rs. 3,500, and that the plaintiff could not in any event recover more than that amount.

The substantial portion of the Subordinate Judge's judgment was as follows:—

"There can be no doubt that an inventory was not exhibited on or before the 22nd January, 1884, as required by the bond, or within six months from the grant, as required by s. 277 of the Indian Succession Act. And it is also an undisputed fact that the accounts were not presented in proper form. It was not until the 4th February, 1885, that the administrator, Mr. Chater, submitted an inventory and an account to the District Judge through the post. The requirements of the rules prescribed by the High Court for the presentation of inventories and accounts (Civil Rules and Orders, p. 146) were not fulfilled in any respect.

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"It is contended that mere failure to submit an inventory or accounts in time was not sufficient to pronounce the bond forfeited, and this intention seems to be valid. In matters like these, the practice of the Courts in England should be the best guide. It was held in *Crowley* v. *Chipp* (1), quoted in Williams on Executors and Administrators, p. 511, that 'the Court might, in its discretion, decline to make any order, notwithstanding it was clear that there had been a breach of the bond. On that occasion an administratrix had not exhibited an inventory and accounts within the time assigned by her administration-bond, but no proceedings had been instituted against her for the purpose of calling for an inventory. An application was made to the Ecclesiastical Court, by a creditor of the deceased, for an order that the bond might be 'attended with,' for the purpose of being sued upon at law; and it was contended that since the non-delivery of the inventory at or before the day specified in the bond clearly constituted a breach of the condition, the Court ought to order the bond to be delivered out. But Sir H. Jenner Fust said that he should be extremely unwilling in any case upon the mere non-delivery of an inventory to allow the bond to be 'attended with,' and he refused to make any order until the parties should have cited the administratrix to bring in an inventory. She afterwards brought one in, whereupon the Court dismissed the parties.' In another case, cited at page 518, the Court refused to permit the bond to be put in suit, on the ground that an inventory and account had not been called for from the administrator. These cases are clear authorities in support of the defendants' contention that the mere non-delivery of an inventory and account do not justify the forfeiture of the bond. The reasons which would induce a forfeiture appear to be that 'the administrator has not delivered a true and perfect inventory, or that he has not made a just and true account'. (Williams, page 546). In this case, when the administrator omitted to submit his inventory and account, the proper course would have been, as was done in the case cited above, to call upon him to file an inventory. But this was not done. He did subsequently file an inventory and accounts. They were not, it is true, verified before a zila Judge or Justice of the Peace, but the defendant, Mr. Chater, has, in this suit, sworn to their correctness. He has

(1) I. Curt. 458.

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pledged his oath that the inventory is true and complete, and that the account is true and correct. The plaintiff has not attempted to show that the defendant's allegations are untrue in regard to any item except one, namely, Mr. Shircore's law books. It is said that the books were valuable, and were removed to Calcutta in order that they might fetch a higher price. Mr. Chater has sworn that he sent the books to Mackenzie, Lyall and Co., a well-known firm of auctioneers in Calcutta, for sale, and that he has entered in his accounts the amount which was received by him as the proceeds of the sale. There is nothing to contradict his sworn statement; and although the books may have been sold for less than their proper value, it cannot be said that he was at all to blame in the matter. The correctness of no other item has been impugned. I accordingly hold that the inventory and accounts submitted by the defendants are true and correct, and that there has been no breach of the conditions of the bond in respect of inventory and accounts such as to induce a forefeiture of it.

"The only other ground on which the bond has been pronounced forfeited is that the assets have not been applied to the payment of debts within a reasonable time. This breach is not, it seems, a valid ground for forefeiture. It is laid down in Williams on Executors and Administrators, page 547, that 'it is no ground of forfeiture that the administrator has not paid the debts of the intestate, and therefore a creditor could not sue upon the bond and assign for breach the non-payment of a debt to him.' There has not, it appears, been any culpable negligence on the part of the defendant in regard to the payment of debts. The defendant swears that, shortly after the death of Mr. Shircore, his household effects were sold in Agra. An advertisement was published in the *Pioneer*, and the claims of some of the creditors were received. In 1884, the defendant states he was in bad health and was obliged to go to Darjeeling, and therefore nothing was done. That he did actually go to Darjeeling also appears from the plaintiff's application to the District Judge, dated 4th November, 1884. In February, 1885, the defendant published a second advertisement in the *Pioneer*, and several claimants appeared. Among these were the plaintiffs Seth Lachhman Das and Hira Lal, proprietor of the firm of Chhotay Lal, Nand Ram, who sent to the defendant affida-

vits in support of their claims in March, 1885. In August, 1885, the defendant gave notice to all the creditors whose claims had been admitted, and among the persons to whom notices were given were the plaintiffs Seth Lachman Das, Chhotay Lal, Nand Ram and Hardwar Nath, the three persons who had moved the District Judge to assign the bond. All the registered creditors, including Hardwar Nath, have received dividends and granted receipts..... The only persons who refused to do so were the plaintiff and Hira Lal, proprietor of the firm Chhotay Lal, Nand Ram. So that, except two of the creditors, the rest have been paid. The non-payment to these creditors is owing to their own laches. They themselves neglected to send in their claims, although all creditors had been called upon to do so, and it is therefore their own fault that they have not been paid. Besides, 'a bond could only be enforced for the general benefit of persons interested in the estate of the intestate, and not for the non-payment of a particular debt'. (Williams on Executors, p. 549). As all the persons interested in the estate except two have been paid, the bond cannot be enforced on the ground that these two persons have not been paid.' For the above reasons, the grounds for which the bond was forfeited were not such as could induce its forfeiture."

The Court accordingly dismissed the suit. The plaintiff appealed to the High Court.

Mr. *G. T. Spankie* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *J. E. Howard* for the respondents.

EDGE, C. J.—This is an action on an administration bond. The defendants are the administrators; the bond was for Rs. 7,000, and one of the conditions was that the administrators should make a true inventory of the estate and exhibit the same at the Court of the Judge of Agra on or before the 22nd January, 1884. The condition to which I have referred is the one relied on in this appeal. As a matter of fact the administrator did not exhibit his inventory in the Court of Agra until February, 1885. The bond was a bond given in accordance with s. 256 of the Indian Succession Act. It was assigned to the plaintiff under s. 257 of the Act. The case came on for trial before the Subordinate Judge of Agra. He

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dismissed the suit, thinking that no substantial breach of the bond had been proved. I am of opinion that the failure to exhibit the inventory was a breach of a condition of the bond. It is an important matter in the administration of an estate that the administrator should file his account in proper time. It is contended that as there had been a breach, which has been admitted, of the bond, the amount recoverable was the sum of Rs. 7,000 mentioned in the bond. It is said that the bond in question was one which came within the exception of s. 74 of the Contract Act, and consequently the whole sum mentioned in the bond became payable on the breach. I think the bond referred to in that exception is of the class of which an illustration is given in the illustrations to the section, and that the bond in question does not come within that exception. If an administration-bond came within that exception, and on breach of any of the conditions of the bond the whole amount of the bond became payable, the result might be that the creditors and heirs of an intestate might receive more, so far as the creditors were concerned, than their debts, and so far as the heirs were concerned, than the balance of the estate in the hands of the administrators. To take a case, assume that an administrator having given a bond like that in this case has fully administered the estate and paid all the creditors the utmost farthing owing to them, and has handed over to the legal representatives the balance which remained in his hands after deduction of the debts of the intestate. There would be in that case no creditors interested in the performance of the conditions of the bond. By interested I mean pecuniarily interested, and the only person who could be interested would be the heir; but neither the creditor nor the heir would have suffered loss by breach of the conditions. If under such circumstances the assignee of the bond would be entitled to recover the full amount mentioned in the bond, what was to become of it? It could not be paid to the creditors, who had no longer any interest and had suffered no loss. The plaintiff could not retain it himself, unless he could show that he had been damnified. The heir could not be entitled in justice or common sense to be paid money recovered as compensation for a damage he had not suffered. It appears to me that in an action brought on the breach of a bond of this description the plaintiff

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cannot recover more damage than he has proved to have resulted to himself or those interested in the bond on which he relies. In this case the plaintiff has not, nor has any one else, suffered any damage whatever. The inconvenience which the plaintiff and the others may have suffered was not caused by the breach complained of, but by reason of their having failed to send in their claims and accept the dividends which were offered to them. I am of opinion that the appeal must be dismissed with costs, and I think it is a case that should never have been brought. It is not contended that the inventory when filed was other than true and complete, nor is it contended that the account was not correct. This being so, the delay in exhibiting the inventory in the District Judge's office, though it would be reprehensible if it could have been avoided, would not, I think, by itself entitle the appellant to succeed in a case like the present to recover the penalty of the administration-bond.

TYRRELL, J.—I concur.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

1887
July 16

THE DELHI AND LONDON BANK (PLAINTIFF) *v.* THE UNCOVENANTED SERVICE BANK, BAREILLY (DEFENDANT).*

Execution of decree—Sale in execution—Rateable distribution among decree-holders—Civil Procedure Code, s. 295—"Decree for money"—"Same judgment-debtor"—Decree for enforcement of lien and against judgment-debtor personally—Decree-holder entitled to proceed against property or person as he may think fit.

U held a money-decree against *B*, *P*, and *R*, in execution whereof he caused to be attached and sold certain property belonging to *B*. *D* held a decree against *B*, *P*, *R*, and *S*, which so far as *P*, *R*, and *S* were concerned, was a decree for enforcement of hypothecation by sale of the judgment-debtor's property, but which did not direct the sale of specific property belonging to *B*. An application by *D*, under s. 295 of the Civil Procedure Code, for an order enabling him to share rateably in the proceeds of *U*'s execution was rejected.

Held that there being no question of fraud in the case, *D* was entitled to enforce his decree in the first instance against the property of *B*; that his decree against *B* did not lose the character of a decree for money under s. 295 of the Code because it directed a sale of the property of the other judgment-debtors; and that

* Second Appeal No. 617 of 1886, from a decree of J. Sladen, Esq., District Judge of Bareilly, dated the 31st March, 1886, reversing a decree of Maulvi Muhammad Abdul Qayum, Subordinate Judge of Bareilly, dated the 27th November, 1885.

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the fact that there were four judgment-debtors in *B*'s decree and only three in *C*'s would not deprive *D* of the right to share ratably. *Shumbhoo Nath Poddar* v. *Lucky Nath Dey* (1) referred to. *Debcki Nundun Sen* v. *Hart* (2), *Jagat Nardin Pal* v. *Dhundhey Rai* (3), and *Hari* v. *Taru Prasanna Mukerji* (4) distinguished.

THIS was a suit to recover a proportionate share of the assets realized in execution of a decree held by the defendants, the plaintiffs having previously made an application in the execution department to the same effect under s. 295 of the Civil Procedure Code, and the application having been rejected. The facts of the case are sufficiently stated in the judgment of Edge, C. J.

Mr. *G. T. Spankie* and Mr. *W. M. Colvin*, for the appellants.

The Hon. *T. Conlan* and Maulvi *Abdul Majid*, for the respondents.

EDGE, C. J.—In this action the plaintiffs claim under s. 295 of the Civil Procedure Code to share ratably in the proceeds of a sale effected in the execution of decrees of the defendants. The facts are shortly these:—On the 9th August, 1884, the defendants obtained two money decrees against Balmukand, Ram Sarup, and Piare Lal. On the 19th January, 1885, the plaintiffs obtained two decrees against the same person and one Rao Sahib Singh.

The defendants obtained an attachment under their decrees against the property of Balmukand and obtained an order that the property should be brought to sale on the 20th April 1885. On the 19th April, 1885, the plaintiffs applied for an attachment under their decrees against the property of Balmukand, and on the 16th April following they applied for an order to enable them to share ratably in the proceeds of the defendants' execution,

The Subordinate Judge decreed the plaintiffs' claim. On appeal the District Judge of Bareilly dismissed the plaintiffs' suit. From that dismissal the present appeal is brought. The decrees of the plaintiffs, obtained on the 19th January, 1885, did not specifically decree that any property of Balmukand should be brought to sale. It is not necessary to consider the nature of those decrees as affecting the other judgment-debtors or their property, further than to say that the plaintiffs could have executed, if they had chosen, their decrees against the property of the other people affected directly by

(1) I. L. R., 9 Calc. 930.
(2) I. L. R., 12 Calc. 293.
(3) I. L. R., 5 All. 566.
(4) I. L. R., 11 Calc. 713.

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the decrees, that is to say, against the property of other judgment-debtors specifically ordered to be sold by those decrees.

On behalf of the defendants it has been contended that the decrees in question of the plaintiffs were not decrees for money within the meaning of s. 295 of the Civil Procedure Code, even against Balmukand, because under them the lien of the plaintiffs could have been enforced against the judgment-debtors other than Balmukand.

It was also contended that the decrees in question were not against the same judgment-debtor, because there was a fourth judgment-debtor, Rao Sahib Singh, affected by the plaintiffs' decrees, who was not affected by the decrees of the defendants.

It was also contended that the plaintiffs were bound in law before having recourse against the property of Balmukand to proceed against the hypothecated property of the other judgment-debtors. It was also urged on behalf of the defendants that the plaintiffs sold and purchased some of the property of the other judgment-debtors decreed to be sold by their decrees. The latter point is one as to which there has been no evidence brought to our attention. Apparently there is no evidence as to when or for what amount, whether reasonable or otherwise, these alleged sales and purchases took place. In fact, we have got no information on which we can act as to the sales. The question was not raised in the written statement, and is one which, even if there had been any evidence in support of it, would merely relate to the amount in respect of which the plaintiffs could claim to share rateably. In support of the contention that the plaintiffs were bound in law to have recourse first to the property of the other judgment-debtors directed to be sold under their decrees, the defendants rely on the case of *Wali Muhammad* v. *Turab Ali* (1) decided by my brother Mahmood and Mr. Justice Straight. We need not discuss that case. It has no bearing on this case. We have in *Johari Mal* v. *Sant Lal* (2) explained that case. It was obviously one of fraud, which required the interference of the equitable jurisdiction of this Court.

No question of fraud arises in this case; therefore there is nothing in law or in equity to prevent the plaintiffs from enforcing their decrees in the first instance against the property of Balmu-

(1) I. L. R., 4 All. 497. (2) I. L. R., 9 All. 434.

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kand. It is obvious that as far as Balmukand was concerned the plaintiffs' decrees were money-decrees. Those decrees did not lose their character as money-decrees against Balmukand because by them a sale of the property of the other judgment-debtors was decreed. We are of opinion that the plaintiffs' decrees, so far as Balmukand was concerned, were decrees for money within the meaning of s. 295 of the Code of Civil Procedure. We express no opinion as to whether they were or were not as against the other judgment-debtors decrees for money within the meaning of that section. That is a question which we need not decide here, as it is not necessary for the decision of this appeal.

The remaining question is whether the fact that there are four judgment-debtors in the plaintiffs' decrees and only three judgment-debtors in the defendants' decrees would deprive the plaintiffs of their right to share rateably.

A precisely similar question was decided by *Shumbhoo Nath Poddar* v. *Lucky Nath Dey* (1). I agree with that decision, and am of opinion that the plaintiffs are entitled to share rateably in the proceeds of the defendant's decrees. The case of *Deboki Nundun Sen* v. *Hart* (2) is not in point and does not conflict with the view of the law which I have expressed. That was a case, to put it shortly, in which the property sold was the joint property of two judgment-debtors, whereas the decree in respect of which the right to claim rateably was made, was a decree against one of the judgment-debtors only. The case of *Jagat Narain Pal* v. *Dhundhey Rai* (3) has been pressed upon us. The facts there are not similar to those of this case, consequently that case does not affect our judgment in this.

The case of *Hart* v. *Tara Prasanna Mukerji* (4) has been relied on by each side. We do not think that, looking at the facts of the case, it is in point. In the result the appeal must be allowed with costs. The decree of the lower appellate Court is set aside and the case remanded under s. 562 of the Civil Procedure Code, to be disposed of by the Judge of Bareilly with reference to the observations made in this judgment. The costs will abide the result.

MAHMOOD J.—I concur.

Cause remanded.

(1) I. L. R., 9 Calc. 920.
(2) I. L. R., 12 Calc. 208.
(3) I. L. R., 5 All. 566.
(4) I. L. R., 11 Calc. 718.

CRIMINAL REVISIONAL.

1887
July 18.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* DEOKINANDAN.

Criminal Procedure Code, s. 198—"*Complaint*"—*Criminal Procedure Code, ss.* 4, 200—*Charge of defamation not made in complaint, but added in subsequent examination.*

A charge of defamation not contained in the complaint presented to the Magistrate, but added subsequently by the Magistrate upon statements made by the complainant in his examination under s. 200 of the Criminal Procedure Code, whether of his own accord or in consequence of suggestions from the Magistrate, is not a legal "complaint" made by an aggrieved person within the meaning of ss. 4(*a*) and 198, so as to enable the Magistrate to take cognizance of the offence. *Queen-Empress v. Kallu* (1) referred to.

THE petitioner in this case was convicted and sentenced by the Joint Magistrate of Allahabad, for defamation (s. 500 of the Penal Code), under the following circumstances:—On the 27th January, 1887, one Baijnath filed a written complaint in the Court of the Joint Magistrate against the petitioner, who was the editor of the *Prag Samachar* newspaper, and between whom and the complainant enmity existed owing to the fact that each had started a school in Allahabad and regarded the other as a rival. The complaint as committed to writing by the Magistrate was headed "charge under ss. 352 and 504 of the Penal Code." It was to the effect that the accused was "in the habit of publishing various kinds of false and libellous matters in respect of the complainant in his paper"; that in particular on the 22nd January, he had falsely accused the complainant of an assault; that, on the 26th, the parties having met a dispute began, in the course of which the complainant said, "If you will write more libellous matter, I will bring an action against you," and that the accused (with two other persons) then used insulting language and tried to strike him.

On the following day, the Joint Magistrate having examined the complainant on oath, passed the following order:—"Let summons issue under ss. 506 and 500 of the Penal Code."

The accused having been convicted and sentenced as above stated, appealed to the Sessions Judge of Allahabad, the principal ground of appeal being that there having been no legal complaint

(1) I. L. R., 5 All. 232.

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of an offence punishable under s. 500 of the Penal Code, there could be no trial and conviction under that section, with reference to s. 198 of the Criminal Procedure Code. Upon this point, the Sessions Judge in his judgment made the following remarks:—

"The first contention in appeal is that the Magistrate had no jurisdiction, because, as the offence of which the appellant has been convicted falls under Chapter XXI of the Penal Code, it was essential that a complaint should be made by the person aggrieved, and it is alleged that no such offence was made. The charge was brought in the petition of complaint under ss. 352 and 504 of the Penal Code (assault and insult calculated to provoke a breach of the peace), but after examining the complainant on oath, as required by s. 200 of the Criminal Procedure Code, the Magistrate considered that the facts alleged disclosed a libel, and that the libel was what the prosecutor really wished to complain of. The accused was therefore charged under ss. 500 and 504 of the Penal Code. It is argued for the appellant that the prosecutor's original intention to complain only of assault and insult is evidenced by his saying (see petition of complaint) that if he *continued* to publish defamatory matter against him he *would* proceed against him, and by his calling witnesses only to prove the assault, in the first instance. But whatever the original intention may have been, it is enough that before the Magistrate the prosecutor distinctly declared his desire to prosecute the accused for defamation. It is further argued that the statement on oath under s. 200 of the Criminal Procedure Code is not "a complaint" in the sense of s. 4 of the Act, and reference is made to the ruling in *Queen-Empress* v. *Kallu* (1). It appears to me that the statement on oath is in elucidation and confirmation of the opening petition, and is a part of the "complaint" laid in the latter. In the case quoted it does not appear who made the first report to the police: possibly the chaukidar, and not the husband. But, however this may be, there is a difference between proceedings initiated in Court by the aggrieved person himself, and a case sent up for trial by the police, in which the person whose complaint in Court was necessary to legalize the prosecution appears only as a witness. I am therefore of opinion that the provisions of s. 198 of the Criminal Proce-

(1) I. L. R., 5 All. 233.

dure Code have been observed." In the result, the Sessions Judge affirmed the conviction, but reduced the sentence from two months' rigorous imprisonment and Rs. 250 fine to one month's simple imprisonment and Rs. 100 fine.

The accused applied to the High Court for revision of the Sessions Judge's order.

Babu *Dwarka Nath Banerji* and Babu *Durga Charan Banerji*, for the petitioner.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

BRODHURST, J.—This is an application for revision of the order of the Sessions Judge of Allahabad, dated the 3rd June 1887, by which he, on an appeal against the order of the Joint Magistrate of Allahabad, dated the 28th March, 1887, affirmed the conviction of the present petitioner under s. 500 of the Indian Penal Code, but reduced his sentence from two months' simple imprisonment and fine of Rs. 250, or in default two months' further simple imprisonment, to one month's simple imprisonment and a fine of Rs. 100, or in default to one month's further simple imprisonment.

Three grounds for revision have been taken. The first of these is, "Because there having been no legal complaint there could be no trial and conviction under s. 500." It is pointed out by Mr. *Banerji*, counsel for the petitioner, that the offence of defamation punishable under s. 500 of the Indian Penal Code is one of the offences mentioned in s. 345 of the Criminal Procedure Code as compoundable; that s. 500 of the Penal Code is in Chapter XXI of that Code; that it is enacted in s. 198 of the Criminal Procedure Code, that "no Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under ss. 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence"; that "complaint", as defined in s. 4 of the Criminal Procedure Code, "means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but does not include the report of a Police officer"; that in this case the complaint was made in writing, but that it does not contain a charge under s. 500 of the Penal Code, and

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that the allusion made in it to "libellous matter" is merely in support of the charges under ss. 352 and 504 of the Penal Code that were there actually made, and Mr. *Banerji* referred to the judgment of my brother Straight in the case of *Queen-Empress* v. *Kallu* (1) as sustaining his plea.

I think Mr. *Banerji's* argument is sound. The libellous matters referred to were published in the *Prag Samachar* of the 22nd January, 1887. The complainant did not on the publication of the paragraph take immediate action. He did not make any objection until he happened to meet the accused in the street. His complaint is dated the 27th January, 1887; the charges preferred in it are of offences under ss. 352 and 504 of the Penal Code, and these offences are alleged to have been committed on the 26th January, 1887, by Pandit Deokinandan, Brahmin, Editor of the *Prag Samachar*, Jagrup, Brahmin, and Ram Bakhsh, Sonar.

In the complaint there is this passage:—"On the 26th January, 1887, all of the accused met the complainant in muhalla Atarsua; the complainant asked the accused No. 1 why he was publishing libellous matters in respect of him, and told him that he should not do so. Thereupon the said accused observed that unless he, the complainant, closed his school he would publish still more defamatory matter in respect of him; that he, complainant, replied, 'If you write still more libellous matters against me I will bring an action against you.' Thereupon all of the accused became angry and used abusive language towards him, and when he remonstrated they raised sticks with the intention of assaulting him and approached near to him calling out 'Strike! Strike!' If the complainant had not moved away and the witnesses had not interfered, all of the accused would undoubtedly have assaulted him."

The cause of enmity is then alluded to, and the petition concludes as follows:—"The complainant therefore prays that after enquiry the accused persons may be punished."

From the above-mentioned passages in the complaint it is I think quite clear that the complainant did not in the first instance prefer a charge of defamation, an offence punishable under s. 500 of the Indian Penal Code, against Pandit Deokinandan, the present

(1) I. L. R., 5 All. 233.

petitioner, but merely charged him and the other two accused persons with offences under ss. 352 and 504 of the Penal Code, and prayed that all of them might be punished for those offences. Summonses were issued, not under ss. 352 and 504, but under ss. 500 and 506 of the Penal Code.

In my opinion, the complainant at the time that he presented his petition of the 27th January last had no intention whatever of prosecuting all or any of the three accused persons on account of the paragraph alluded to as having been published in the *Prag Samachar* of the 2nd *idem*. The ruling referred to is in point, and the evidence of the complainant, which was given on a date subsequent to that on which the petition was filed, does not, I think, cure the defect in the complaint.

The Joint Magistrate has in his judgment observed :—"The mere omission to include in the complaint a charge under s. 500 of the Code could not invalidate the procedure of the Court. It very frequently happens that the actual offences complained of are not correctly stated in complaints, due on the one hand to the want of acquaintance petition writers and pleaders' clerks have with the law, and on the other to the inaccurate way in which complainants state their grievances. Along with his complaint the prosecutor filed a copy of the *Prag Samachar* of the 22nd January, 1887, complaining of the libel complained of. The Court by its action was therefore only taking up the actual complaint, and on these grounds I overrule the legal objection raised."

I do not concur in these remarks. If a charge of defamation can, subsequent to the presentation of the complaint, be added by the Magistrate on statements made by the complainant in his evidence, whether of his own accord or with reference to suggestions made by the Magistrate, I fail to see what difference of procedure there can be between the classes of cases referred to in ss. 198 and 199 of the Criminal Procedure Code and other cases not included in those sections.

I think that the first ground for revision is valid, and I am therefore constrained to set aside the conviction and sentence, and to direct that the fine, if realized, be refunded.

Conviction set aside.

1887
June 22.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS v. ZAKIUDDIN AND ANOTHER.

Public nuisance—Slaughter of kine by Muhammadans on their own property —Act XLV of 1860 (Penal Code), ss. 268, 290.

A person wilfully slaughtering cattle in a public street, so that the slaughter could be heard and seen by the passers-by, would commit an offence punishable under s. 290 of Penal Code.

But where certain Muhammadans, for a religious purpose, killed and cut up two cows before sunrise in a private compound, partly visible from a public road, and the killing of one of the cows only was witnessed by one Hindu—*held* that the circumstances proved did not amount to the commission of a public nuisance as defined in s. 268 of the Code.

Muttumira v. *Queen-Empress* (1) referred to.

THE facts of this case are sufficiently stated in the judgment of Brodhurst, J.

Mr. *Amiruddin*, for the petitioners.

Babu *Jogindro Nath* and Munshi *Ram Prasad*, for the complainants.

The *Public Prosecutor* (Mr. *G. E. A. Ross*) for the Crown.

BRODHURST, J.—The two applicants have applied for revision of an order of the officiating Magistrate of Pilibhit, by which he convicted them under s. 290 of the Indian Penal Code, and sentenced them each to pay a fine of Rs. 2.

The Magistrate found that the applicants had killed two cows in their compound, and had there cut up and disposed of the carcasses, and had thus committed a public nuisance punishable under s. 290 of the Indian Penal Code.

The Magistrate observes :—" The place in which the slaughter occurred was a compound by the house of the defendants. The wall of the compound has fallen into ruin, and the compound is visible from a high road which passes it. Only one person for the prosecution says he saw the actual slaughter, and he professes to have been on a visit to the defendants. His evidence, at least, is of no use to prove a public nuisance. The case against the accused can only be based on more general grounds, namely, that the slaughter was committed, and that such an event would neces-

(1) I. L. R., 7 Mad. 590.

sarily cause annoyance to Hindu passers-by. If this were the result, the case would arise under s. 290 of the Indian Penal Code. I assume that the carcasses were cut up at the place indicated by the defendants, and that if they were about a foot high, they would not be visible from the road. At such a place they would not, when merely laid out, annoy passers-by. At the same time the previous felling for slaughter, if there were any passers-by at the time, would be visible; and the stir and moving about of the persons cutting up the carcasses would, in the ordinary course of things, be noticed by persons on the road, even if they could not see the carcasses or cut-up meat. I do not understand it to be pleaded that these occurrences could be hidden from the road."

The Magistrate finds that the slaughter took place "at quite early morning," and remarks, "as to the witnesses, I have already expressed my doubts about them and their way of representing the occurrences and their recourse to the spot. The accused pleaded that they killed only two cows; that they killed them on the 11th September, 1886, merely with a religious object and without any intention of annoying the Hindus; that they killed them in their own compound, where they had on former occasions sacrificed kine, and that a similar charge, preferred by the Hindus in 1865, was dismissed."

The Magistrate observes:—"The defence which seems to me to deserve most consideration is this, that there must be taken to have been a refusal to interfere in this matter in 1865, and a certain measure of uncertainty about the matter since."

It appears that, on the 11th September, 1886, two cows were killed with a religious object in the compound of the accused; that they were killed before sunrise; that at the most, the killing of one cow was witnessed by merely one Hindu, and by him only because he unfortunately chose that day and an unusually early hour to pay a visit to his Muhammadan acquaintances. No one else is found to have seen the killing of the cows or the carcasses or the cut-up meat. If a few Hindus passing by a private compound can have the occupants of that compound punished for a public nuisance merely because they have seen the occupants moving about in their compound, and imagine that they are engaged

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in cutting up the carcasses of cows, much more could the butchers, who, in the exercise of their trade, carry beef for sale through the streets of almost every station in British India, be punished for a public nuisance.

Sir Charles Turner, in his judgment in *Muttumira* v. *Queen-Empress* (1), observed :—"A public nuisance is defined in the Penal Code as an act or omission which causes any common injury, danger, or annoyance to the public or people in general, who dwell or occupy property in the vicinity, or which must necessarily cause obstruction, danger, or annoyance to persons who may have occasion to use any public right. It is obvious from the language of the Act that it was not intended to apply to acts or omissions calculated to offend the sentiments of a class. In this country it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. The scope of the provision we are considering is to protect the public or people in general, as distinguished from the members of a sect, from injury, danger, or annoyance in the neighbourhood of places where they dwell or occupy property, or when they have occasion to use a public right."

I am by no means prepared to hold that a slaughterer of cattle could under no circumstances be convicted of a public nuisance as defined in s. 268 of the Indian Penal Code ; for, if a person wilfully slaughtered cattle in a public street so that the groans and blood of the poor beasts were heard and seen by the passers-by, he would commit acts that would necessarily cause annoyance to every one of them, Hindu, European, Muhammadan or other, who was not utterly devoid, not merely of refinement, but also of all proper feeling : and he undoubtedly would, in my opinion, be punishable under s. 290 of the Indian Penal Code.

As regards the petitioners, however, I consider that, under the circumstances I have above mentioned, they have been wrongly convicted. I therefore set aside their convictions and direct that the fines, if realized, be refunded.

In conclusion, I may add that I think the Muhammadans of Pilibhit are entitled to know whether or not they may on special

(1) I. L. R., 7 Mad. 590.

occasions, for religious purposes and under certain restrictions, be permitted, as Muhammadans are, I believe, in many other places in British India permitted, to sacrifice kine on their own premises. If they are allowed to do so, a clear municipal rule should be framed so as to ensure that cattle killed under such circumstances should be slaughtered, and the carcasses disposed of, in such a way as to cause the least possible annoyance to Hindus and other persons.

Convictions set aside.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

GANESH SINGH (PLAINTIFF) *v.* SUJHARI KUAR (DEFENDANT).*

Mortgage—Mortgagee of non-transferable property—Right to sue for mortgage-money—Act IV of 1882 *(Transfer of Property Act), s.* 68 *(b), (c).*

Where a decree was obtained by a landholder for cancelment of a deed whereby an occupancy-holding was mortgaged with possession, and the mortgagee consequently failed to obtain possession, and brought a suit against the mortgagor to recover the mortgage money,—*held* that inasmuch as the mortgagor must have known that he was mortgaging an estate not legally transferable, while the mortgagee might have believed that the estate was transferable, the act of the former was a default depriving the latter of his security, within the meaning of s. 68 (*b*) of the Transfer of Property Act (IV of 1882), and the mortgagee was, therefore, entitled to succeed.

THE facts of this case were as follows:—On the 16th February, 1885, the defendant, Musammat Sujhari Kuar, executed in favour of the plaintiff, Ganesh Singh, a deed whereby she mortgaged a cultivatory holding of 26 bighas 19 biswas 4 dhurs in consideration of Rs. 599. Under this deed the plaintiff was entitled to possession of the mortgaged property. Shortly after execution of the deed, however, a suit was brought by Madho Prasad, one of the zamindars of the village, for cancelment of the deed, on the ground that the defendant was his occupancy tenant of the mortgaged property, and that the mortgage was, therefore, contrary to the provisions of s. 9 of the N.-W. P. Rent Act (XII of 1881). On the 8th June, 1885, the zamindar obtained a decree in that suit. Being unable,

* Second Appeal, No. 1101 of 1886, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 11th March, 1886, confirming a decree of Babu Nihal Chandra, Munsif of Azamgarh, dated the 9th November, 1885.

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consequently, to obtain possession under the mortgage deed, the plaintiff brought the present suit to recover the money which he had advanced to the defendant, with interest.

The Court of first instance (Munsif of Azamgarh) dismissed the suit upon grounds not material to this report. On appeal by the plaintiff, the lower appellate Court dismissed the appeal, on the ground that, "before bringing the suit, the plaintiff should have asked the defendant if she could mortgage other property or give him other security for his money: Act IV of 1882, s. 68, cl. (*c*). If the defendant should be unable to give the plaintiff other security, then the plaintiff might bring a suit to recover his money."

The plaintiff appealed to the High Court.

The Hon. *T. Conlan* and Mr. *W. M Colvin*, for the appellant.

Mr. *C. Ross Alston*, Munshi *Hanuman Prasad*, and Munshi *Kashi Prasad*, for the respondent.

BRODHURST and TYRRELL, JJ.—The respondent in this case gave the appellant a mortgage upon a cultivatory holding. It turned out that that cultivatory holding was of the non-transferable kind referred to in s. 9 of the N.-W. P. Rent Act. The respondent was in consequence unable to give possession to the appellant, and he has therefore brought this suit to recover his money. He has been defeated upon the ground that s. 68, cl. (*c*), of Act IV of 1882, made it obligatory upon him to require the respondent to give him another sufficient security for his debt, a step which admittedly he has not taken. The Courts below accordingly dismissed the appellant's claim.

In second appeal it is argued that clause (*b*) of the above section contains the law applicable to the circumstances of this case, because the mortgagee has been deprived of the whole of his security in consequence of the default of the mortgagor. This contention must prevail. It is unquestionable that the mortgagor is in default, and the only plea urged here against the appellant is that he knew the law and was aware that the security he was taking was not transferable to him. Even if this consideration was sufficient to defeat his present claim, it is to be observed that it is not proved, or even asserted, that the appellant had this knowledge. While it

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is certain that the respondent must have known that she was mortgaging an estate which was by law not transferable, the appellant may well have believed that her tenure was of a transferable character. The appeal is decreed, and the appellant's claim is decreed with costs in all the Courts.

Appeal allowed.

1887
August 6.

Before Mr. Justice Mahmood.

JIWA RAM SINGH (PLAINTIFF) v. BHOLA AND ANOTHER (DEFENDANTS) *

Small Cause Court suit—Suit for damages—Personal injury—Actual pecuniary damage—Act XI of 1865 (Small Cause Courts Act), s. 6— Suit instituted before commencement of Act IX of 1887 (Small Cause Courts Act)—Act IX of 1887, s. 3 (a).

The plaintiff in a suit for damages laid at Rs. 200 claimed Rs. 50 on account of medical expenses caused by an assault committed on him by the defendants, Rs. 50 as the costs of a criminal prosecution which he had brought against them, and Rs. 100 for injury to his reputation and feelings.

Held that inasmuch as part of the claim related to alleged actual pecuniary damage resulting from an alleged personal injury, the whole suit was, with reference to s. 6, proviso (3), of the Mufassil Small Cause Courts Act (XI of 1865), of the nature cognizable by a Court of Small Causes, and that, under s. 586 of the Civil Procedure Code, no second appeal in such suit would lie. *Gunga Narain Maytra* v. *Gudadhar Chowdhry* (1) referred to.

THE plaintiff in this suit claimed Rs. 200 as damages upon the following statement. He alleged that he had been assaulted by the defendants, who were his tenants; that his injuries had involved him in expenditure on account of medical treatment in hospital to the extent of Rs. 50; that he had also been put to the expense of a criminal prosecution against the defendants which had cost him Rs. 50, and he claimed another Rs. 100 on account of injury to his reputation and his feelings.

The Court of first instance (Munsif of Bulandshahr) decreed the claim on the first head to the extent of Rs. 10; on the second head to the full extent of Rs. 50; on the third head to the extent of Re. 1. On appeal by the defendants, the lower appellate Court disallowed the claims under the first two heads and gave the plaintiff

* Second Appeal, No. 1244 of 1886, from a decree of H. G. Pearse, Esq., District Judge of Meerut, dated the 27th April, 1886, modifying a decree of Maulvi Syed Ahmad Ali, Munsif of Bulandshahr, dated the 27th February, 1886.

(1) 13 W. R. 434.

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a decree for Rs. 1 on the third head only. He appealed to the High Court.

Pandit *Moti Lal*, for the appellant.

Lala *Jokhu Lal*, for the respondents.

A preliminary objection was raised on behalf of the respondents to the hearing of the appeal, on the ground that it was barred by s. 586 of the Civil Procedure Code.

MAHMOOD, J.—This appeal has arisen out of an action for recovery of Rs. 200 claimed as damages by the plaintiff for his bodily injury resulting from his having been assaulted by the defendants, and also for the consequent loss of reputation and hurt of feelings, and also in respect of the expenses incurred in the hospital, and in payment of fees to the legal practitioners who prosecuted the defendants in the criminal Court in respect of such assault. The first Court decreed the claim in part, but the lower appellate Court has modified the first Court's decree by assessing damages at only Rs. 1, to which extent it upheld the first Court's decree.

The plaintiff has preferred this second appeal; but to the hearing of the appeal Mr. *Moti Lal*, who appears for Mr. *Howell* on behalf of the respondents, objects that, the suit being one cognizable by the Court of Small Causes, no second appeal lies to this Court under s. 586 of the Civil Procedure Code, and in support of this contention the learned pleader cites the case of *Gunga Narain Moytro* v. *Gudadhar Chowdhry* (1), in which Glover and Hobhouse, JJ., concurred in the opinion that to suits in which even a portion of the claim for damages was claimed as actual damages, the third proviso of s. 6 of the Mufassil Small Cause Courts Act (XI of 1865) did not apply, and that in such cases no second appeal would lie.

Having read the prayer for relief of the plaintiff in this case contained in para. 4 of the plaint, I have no doubt that this suit, so far as this preliminary objection is concerned, is on all fours with the case cited on behalf of the respondents. Because there, as here, the claim for damages referred to loss of reputation along with actual damages. In this case it cannot be doubted that the

(1) 13 W. R., 434.

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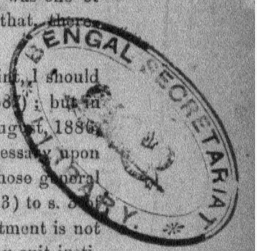
hospital expenses and the fees paid to the lawyer for prosecuting the defendants were claimed as actual damages.

It is of course not necessary for me to decide whether such fees could be claimed; but considering the nature of the suit as set forth in the plaint and the ruling of the Calcutta High Court to which reference has been made, I am of opinion that the suit was one of the nature cognizable by the Small Cause Court, and that, therefore, no second appeal lay to this Court.



Some suggestion was made that, in deciding this point, I should refer to the new Small Cause Courts Act (IX of 1887); but in this case the second appeal was instituted on the 2nd August, 1886, and the consideration of the new law would be unnecessary upon general principles of construing statutes, and, indeed, those general principles have been duly given effect to in clause (3) to s. [illegible] this enactment itself, which provides that the new enactment is not to affect any proceedings before or after decree in any suit instituted before the commencement of the Act. It is therefore clear that the new Act is not applicable, and, as I have already said, under the old Act, this was a Small Cause Court suit, and, being of less value than Rs. 500, was not a fit one for being made the subject of second appeal under s. 586 of the Civil Procedure Code. The appeal is dismissed with costs (1).

Appeal dismissed.

Before Mr. Justice Mahmood.

1887
August 10.

RAM SARAN AND ANOTHER (JUDGMENT-DEBTORS) *v.* PERSIDHAR RAI AND OTHERS (DECREE-HOLDERS).*

Civil Procedure Code, s. 206—Power of lower Court to amend decree affirmed on appeal.

Where a decree for possession of immoveable property, passed by a lower appellate Court, omitted to specify the plots of land to which it related, and was upheld by the High Court by a decree which likewise gave no specification of those plots, and the lower appellate Court subsequently, on the decree-holder's application, amended its decree, under s. 206 of the Civil Procedure Code, by inserting the required specification,—*held* that inasmuch as the effect of the amendment was not to alter the effect of the High Court's decree, or to affect

* Second Appeal, No. 448 of 1887, from a decree of G. J. Nicholls, Esq., District Judge of Gházipur, dated the 4th December, 1886, confirming a decree of Munshi Syad Zain-ul-abdin, Munsif of Korautadih, dated the 18th September, 1886.

(1) See also *Debi Singh* v. *Hanuman Upadhya*, I. L. R., 3 All. 747.

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property other than that actually claimed and decreed, the amendment was not contrary to law. *Shahrat Singh* v. *Bridyman* (1), *Gobardhan Das* v. *Gopal Ram* (2), *Kristo Kinkur Roy* v. *Rajah Barroducaunt Roy* (3), and *Sundara* v. *Subbana* (4) referred to.

The facts of this case were as follows:—Persidhar Rai and others sued Ram Saran and others for possession of certain plots of lands specified in the plaint, and their suit was dismissed by the first Court on the 28th April, 1882; but upon appeal that decree was reversed by the lower appellate Court on the 19th November, 1883, which decreed the claim, but omitted to enter in its decree the numbers and specifications of the plots which formed the subject-matter of the decree. That decree was upheld by the High Court on the 19th March, 1885, and the decree prepared in the High Court also gave no specification of the plots to which the suit related.

An application for execution of decree and recovery of possession of the plots aforesaid was made by the decree-holders on the 9th August, 1885, but it was opposed by the judgment-debtors upon the ground that the only decree capable of execution was the final decree of the High Court, and inasmuch as that decree did not contain a specification of the plots, it could not be executed.

These objections were disallowed by the Court of first instance, which, by its order of the 15th September, 1885, directed that the decree-holders should be placed in possession of the plots to which their suit related. Upon appeal to the lower appellate Court, that Court held that so long as the decree of the High Court remained unamended and silent as to the numbers of the plots in suit, the decree could not be executed, and upon this ground it disallowed execution by its order of the 17th April, 1886. That order was not appealed from, and became final. Thereupon the judgment-debtors applied to the Munsif to regain possession of the land from which they had been ousted under the decree, and they were accordingly restored to such possession on the 9th August, 1886. In the meantime the decree-holders made an application to the lower appellate Court to amend its decree of the 19th November, 1883, by entering therein a specification of the plots

(1) I. L. R., 4 All. 376.
(2) I. L. R., 7 All. 366.
(3) 14 Moo. I. A., 465.
(4) I. L. R., 9 Mad. 354.

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which formed the subject-matter of this suit, and their application was granted and the requisite amendment made on the 18th June, 1886. The decree having thus been amended, the present application for execution was made by the decree-holders on the 9th August, 1886, and it was allowed by the Court of first instance, and that order was upheld by the lower appellate Court. The judgment-debtors appealed to the High Court.

Munshi *Sukh Ram*, for the appellants.

Mr. *G. T. Spankie* and Lala *Juala Prasad*, for the respondents.

MAHMOOD, J.—The arguments which Mr. *Sukh Ram* on behalf of the appellants and Mr. *Juala Prasad* on behalf of the respondents have addressed to me raise only two questions for determination:—

(1) Whether, with reference to the order of the 17th April, 1886, the present execution proceedings were barred by the rule of *res judicata* under the ruling of the Privy Council in the case of *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (1) and *Rup Kuari* v. *Ram Kirpal Shukul* (2).

(2) Whether the order made by the lower appellate Court on the 18th June, 1886, amending its decree of the 19th November, 1883, was legal, in view of the circumstance that the decree has been subjected to appeal to this Court, and the final decree in the case was passed by this Court on the 19th March, 1885.

Upon the first of these two points I do not think it is necessary to say anything beyond observing that the two cases relied upon do not apply, because the effect of the Judge's order of the 17th April, 1886 was to hold that the decree, so long as it remained unamended, was not capable of execution and that it needed amendment. The present application is not one in which the same unamended decree is sought to be executed, but it is an application which relates to the execution of the decree after amendment.

The second question, however, is the only real question in the case, and it is a question of law, because the language of s. 206, which enables the Court passing a decree to amend its decree, is silent as to whether such amendment can be made by such Court

(1) I. L. R., 8 Calc. 51; L. R., 8 I. A. 123. (2) I. L. R., 6 All. 269.

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after the decree sought to be amended has already become the subject of an appeal before a higher tribunal. Illustrations of how difficulties may arise in connection with the exercise of the power conferred by that section are to be found in some of the reported cases—in *Raghunath Das* v. *Raj Kumar* (1) and *Surta* v. *Ganga* (2), but this is the first time I have had specifically to deal with the question whether or not the exercise of these powers by a Court passing a decree is legal after the decree has been the subject of an appeal. Mr. *Sukh Ram* argues that under the Full Bench ruling of this Court in *Shohrat Singh* v. *Bridgman* (3) it is the decree of the last Court only which can be executed; and inasmuch as here the decree of the last Court was that of the High Court, dated the 19th March, 1885, and such decree was silent as to the specification of the plots, therefore the amendment of the decree by the lower appellate Court was illegal, because not that decree that could be executed. In dealing it was with this contention, I think it is enough to say that the effect of that Full Bench ruling was explained by Oldfield, J., in *Gobardhan Das* v. *Gopal Ram* (4), in which it was held that in cases where a decree of the last Court only affirms the decree of the lower Court, the Court executing the final decree is at liberty to refer to the lower Court's decree for explanation and information. And this view was consistent with the ruling of the Privy Council in *Kristo Kinkur Roy* v. *Rajah Burroducaunt Roy* (5).

It is, therefore, clear, in the absence of statutory provision to the contrary, that in a case of this kind, this Court's decree having only upheld the decree of the lower Court, no practical injury can arise in execution, if the lower Court, after the decree had been confirmed by this Court, amended its decree, as was done in this case. There is, indeed, no contention here that the effect of the amendment made by the lower Court is such as to alter the effect of this Court's decree, or to render land other than that which was actually claimed and actually decreed liable to the decree.

Under these circumstances, I think that the amendment of the decree by the lower appellate Court was not opposed to any provision of the law, and that it has caused no injury to the present

(1) I. L. R., 7 All. 276, 876.
(2) I. L. R., 7 All. 411, 875.
(3) I. L. R., 4 All. 376.
(4) I. L. R., 7 All. 366.
(5) 14 Moo. I. A. 405.

appellant. In this view I am supported by a ruling of the Madras High Court in *Sundara* v. *Subbana* (1), where Collins, C. J., and Muttusami Ayyar, J., concurred in holding that, under s. 206 of the Civil Procedure Code, the Court has power to amend its decree by bringing it into conformity with the judgment after such decree has been confirmed on appeal. This view of the law was accepted by Oldfield and Brodhurst, JJ., in Misc. No. 213 of 1886, *Mohan Lal* v. *Lachmi Prasad* (2), decided on the 22nd December, 1886.

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The amendment was, therefore, properly made and has caused no failure of justice.

I dismiss this appeal with costs.

Appeal dismissed.

CRIMINAL REVISIONAL.

1887
September 9.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS v. JAGJIWAN AND OTHERS.

Summary trial—Complaint including charge not summarily triable—Summary jurisdiction not necessarily ousted thereby—Criminal Procedure Code, s. 260.

The mere circumstance of a complaint charging an accused person with offences not summarily triable along with other offences so triable would not necessarily oust the summary jurisdiction of a Magistrate under s. 260 of the Criminal Procedure Code. Whether a complaint affords sufficient grounds for a summary trial, or requires a trial according to the ordinary procedure, must be left in a great measure to the discretion of the Magistrate, exercised with due care according to judicial methods with reference to the circumstances of each case. *Ramchunder Chatterjee* v. *Kanhya Laha* (3), *Chunder Seekar Sookul* v. *Dhurm Nath Tewaree* (4), *Beputoolla* v. *Najim Sheikh* (5), and *Empress* v. *Abdool Karim* (6) referred to.

THE facts of this case, which was a reference under s. 438 of the Criminal Procedure Code, are stated in the judgment of Mahmood, J.

MAHMOOD, J.—In this case one Musammat Sheo Kumari, a Hindu widow, whose husband died in 1885, filed a complaint in the Court of the Joint Magistrate on the 25th March, 1887, alleging that certain acts were committed by the accused on the previous day, and that those acts amounted to offences under ss. 322, 448,

(1) I. L. R., 9 Mad. 354.
(2) Not reported.
(3) 25 W. R. Cr. 19.
(4) 1 Calc. L. R. 434.
(5) 2 Calc. L. R., 374.
(6) I. L. R. 4 Calc. 18.

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and 382 of the Indian Penal Code. In the petition of complaint no reference was made to any other offence, and the Joint Magistrate thereupon dealt with the case as falling under ss. 323 and 448 of the Indian Penal Code, and, as such, he tried the case summarily under s. 260 of the Criminal Procedure Code, and, holding that the evidence for the prosecution was untrustworthy, dismissed the complaint. The offences to which those two sections of the Indian Penal Code relate are triable summarily under s. 260 of the Criminal Procedure Code, under clauses (c) and (h) respectively, and there can, therefore, be no question that the action of the Magistrate to this exent was not illegal. As to the remaining section 382 of the Indian Penal Code, under which the accused had been charged by the complainant, it seems to me enough to say that the facts as stated in the complainant's petition of the 25th March, 1887, themselves fell short of showing any such offence as is contemplated by that section, and the Magistrate was, therefore, right in not charging the accused under that section.

It then appears that the prosecutrix, Musammat Sheo Kumari, preferred an application for revision to the learned Sessions Judge on the 25th June, 1887, asking for interference under ss. 435 and 438 of the Criminal Procedure Code, and in that petition the main contention was that the complaint amounted to a charge of offences under ss. 147, 451, 452, and 382 of the Indian Penal Code, and that the action of the Joint Magistrate in trying the case summarily was, therefore, illegal. This contention appears to have been accepted by the learned Sessions Judge, who, acting under s. 438 of the Criminal Procedure Code, has referred this case for the exercise of the revisional powers of this Court. It appears from the learned Judge's order of the 11th August, 1887 that he was labouring under a misapprehension in thinking that the prosecutrix's complaint of the 25th March, 1887 made any mention of ss. 147, 451 and, 452 of the Indian Penal Code; and although s. 382 of that Code was mentioned in the complaint, it is clear to me that the facts stated in the petition of complaint itself would furnish no foundation for a charge under that section. The mistake as to the sections under which that charge was brought appears to be shared by the Joint Magistrate in the explanation which he has submitted in conformity with the rules of this Court, and he

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seems to think that charges under ss. 147, 451, and 452 formed part of the original charge brought by the complainant against the accused.

All I have now to consider is whether the circumstances of the case require me to interfere in revision under the powers vested in this Court by s. 439 of the Criminal Procedure Code. In deciding this question, I have felt some difficulty at the outset as to whether the mere circumstance that the prosecutrix, in preferring her complaint of the 25th March, 1887, included a charge under s. 382 of the Indian Penal Code, is a circumstance which by itself ousts the summary jurisdiction of the Joint Magistrate under s. 260 of the Criminal Procedure Code. The learned Judge has expressed the view that the decision of the question whether a complaint is or is not summarily triable is to be regulated by the complaint itself. The learned Sessions Judge observes:—"The charge may be exaggerated, but the law does not allow the Magistrate to pre-suppose this in order that he may try the case summarily."

This view seems to be to some extent in accord with the rulings of the Calcutta High Court in *Ramchunder Chatterjee* v. *Kanhye Laha* (1), *Chunder Seekor Sookul* v. *Dhurm Nath Tewaree* (2) *Heputoolla* v. *Najim Sheikh* (3), and *Empress* v. *Abdool Karim* (4). The facts of those cases are, however, distinguishable from those of this case now before me. In the last-mentioned ruling the learned Judges in expressing their opinions laid down the rule that if a charge of an offence "not triable is laid and sworn to, the Magistrate must proceed with the case accordingly, *unless* he is at the outset in a position to show from the deposition of the complainant that the circumstances of aggravation are really mere exaggeration and not to be believed."

I agree in the rule so laid down, but I must say that I am not prepared to hold that the mere circumstance of a complaint charging an accused person of offences not summarily triable would oust the summary jurisdiction of a Magistrate under s. 260 of the Criminal Procedure Code. It is far from being an uncommon circumstance that complainants, either *bonâ fide* suffering from a grievance or out of ill-will towards the accused, exaggerate the heinous-

(1) 25 W. R. Cr. 19.
(2) 1 Calc. L. R. 434.
(3) 3 Calc. L. R. 374.
(4) I. L. R. 4 Calc. 18.

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ness of the facts complained of; and if I were to hold that the terms of the complaint are in themselves conclusive to decide the question as to whether the case might be summarily tried or not, I should virtually be holding that the summary jurisdiction can be evaded at the choice of the complainant. In this class of cases no hard-and-fast rule can be laid down, and much depends upon the facts and circumstances of each individual case. The Criminal Procedure Code has empowered Magistrates, under certain limitations, to decline to proceed with a complaint; and even in cases not summarily triable, it is only when a Magistrate sees sufficient ground for proceeding against the accused that a charge is framed. This, speaking in general language, is the effect of ss. 210 and 254, Criminal Procedure Code, and I think that whether a complaint does or does not afford sufficient grounds for a summary trial, or requires a trial under the ordinary procedure, is a question which must be left in a great measure to the discretion of the Magistrate, which discretion of course must be exercised with due care and caution according to judicial methods, with reference to the circumstances of each case. In this case, the facts as stated by the complainant might possibly have fallen under s. 147, 451, or 452 of the Indian Penal Code, none of which offences was summarily triable. But before the Magistrate could charge the accused under those sections, he would have to satisfy himself that there was ground for proceeding under any of those sections. The Magistrate, in the present case, does not appear to have rejected any evidence for the prosecution, and his judgment shows that he disbelieved the entire evidence adduced on behalf of the prosecution. Under these circumstances, I do not think that the case requires any interference in revision. I therefore decline to interfere. The record will be returned.

Application rejected.

1887
September 16.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* WAZIR JAN.

Personating public servant—Extortion—Several offences—Conviction for each offence proved necessary—Separate sentences—Sentence necessary upon each conviction—Act XLV of 1860 *(Penal Code), ss.* 71, 170, 383—*Criminal Procedure Code, ss.* 35, 235.

Where more than one offence is proved in respect of which the accused has been charged and tried, a conviction for each such offence must follow, whether

s. 71 of the Penal Code applies to the case or not; and, subject to the provisions of s. 71, a separate sentence must be passed in respect of each such conviction.

Under s. 35 of the Criminal Procedure Code, sentences of imprisonment cannot be passed so as to run concurrently.

In a trial for offences under ss. 170 and 383 of the Penal Code, committed in the same transaction, it appeared that but for personating a public servant the accused would not have been in a position to commit the act of extortion complained of.

Held that the first and second paragraphs of s. 71 of the Penal Code did not apply to the case; that the third paragraph also did not apply, because the words "constitute an offence" refer to the definitions of offences contained in the Code, irrespective of the evidence whereby the acts complained of are proved, and personating a public servant as defined in s. 170 was not a constituent element of extortion as defined in s. 383; that in the present case the former offence was completed before the latter had begun; and that separate sentences for each offence were, therefore, not illegal.

THE petitioner in this case, Wazir Jan, was convicted by the Joint Magistrate of Benares of personating a public servant (s. 170 of the Penal Code) and extortion (s. 384) under the following circumstances:—The complainant, Ram Charan, *teli*, in company with three other persons, on the 7th April, 1887, brought oil, upon which octroi duty was payable, into the city of Benares for sale. The *muharrir* at the octroi post gave the four men a single pass covering the imports of them all, and this pass was made out in the name of one of them only, Bhawani Prasad. After leaving the octroi post, the four men separated, Bhawani Prasad keeping the pass, and Ram Charan thus having nothing to show that he had paid the duty. Shortly afterwards, the accused, pretending to be a *girdawar* or patrol on the octroi establishment, came up, accused him of bringing oil into the city without paying duty, and finally extorted from him Re. 1 by threats of imprisonment, though the complainant obtained and showed the pass in proof of payment.

The accused was charged, in the first instance, with the offence punishable under s. 170 of the Penal Code only. In consequence, however, of a question being raised by his pleader as to whether an octroi patrol was a "public servant" within the meaning of ss. 21 and 170 of the Penal Code, the Joint Magistrate, after all the evidence had been taken, added a charge of extortion under s. 384. A conviction was recorded upon each charge, and the Joint Magistrate passed sentence in the following terms:—"I sentence him

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under s. 170 of the Penal Code to nine months' rigorous imprisonment, and under s. 384 to nine months' rigorous imprisonment; the sentences will run concurrently."

The accused appealed to the Sessions Judge of Benares, who affirmed the convictions. With regard to the sentences, the Sessions Judge observed:—"I am not aware that "concurrent sentences" are mentioned in the Criminal Procedure Code. And if my recollection is correct, instances have occurred in which jail authorities have treated two "concurrent" as two independent sentences, and detained a prisoner twice the term that the Court intended, or, at all events, in excess of the real period of imprisonment adjudged. The order I pass is that both convictions are upheld, that the sentence of nine months' rigorous imprisonment be regarded as passed under s. 384 of the Penal Code, and that it is unnecessary to record any sentence in respect of the conviction under s. 170 of the said Code."

The prisoner applied to the High Court for revision of this order, the principal ground stated in the petition being that the Joint Magistrate had acted illegally in adding the charge under s. 384 of the Penal Code, and that the sentence passed in respect of that charge should, therefore, be set aside.

Mr. *J. D. Gordon*, for the petitioner.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

MAHMOOD, J.—The facts found by both the lower Courts on the evidence before them are sufficient to substantiate the offence of personating a public servant within the meaning of s. 170 of the Indian Penal Code, and also the offence of extortion punishable under s. 384 of that Code, and in respect of those findings I see no reason to differ with the Courts below. But Mr. *Gordon*, in supporting the petition, argues that the charge originally referred only to s. 170 of the Indian Penal Code, and that the charge under s. 384 was added so late that it has prejudiced the petitioner. I cannot accept this contention, because the terms of s. 227 of the Criminal Procedure Code, read even with the two following sections, are sufficiently wide to permit the Magistrate to amend the charge in the manner in which it was amended in this case. In this case the facts and the evidence on which the conviction

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proceeded would not vary by reason of such alteration or addition, and there was, therefore, no prejudice to the petitioner by reason of the charge having been amended. I might almost go further and say that even if there had been an irregularity, under the circumstances of this case, I should have regarded it as one covered by s. 537 of the Criminal Procedure Code.

I agree with the learned Sessions Judge in the view that the evidence was sufficient to convict the petitioner under both s. 170 and s. 384 of the Indian Penal Code. But the learned Judge in convicting the prisoner under both sections has passed a sentence of nine months' rigorous imprisonment only under s. 384 of the Indian Penal Code, and he goes on to observe "that it is unnecessary to record any sentence in respect of the conviction under s. 170 of the said Code." The Court of first instance, that is, the Magistrate, had sentenced the accused to nine months' rigorous imprisonment for each of the two offences and directed the sentences to "run concurrently."

This state of things raises the following three questions of law which it is necessary for me to decide :—

(1) Whether the Magistrate was right in convicting the accused both under s. 170 and s. 384 of the Indian Penal Code.

(2) Whether the Magistrate was right in passing separate sentences with the direction that they were to "*run concurrently.*".

(3) Whether the learned Sessions Judge was right in declining to pass any sentence in respect of the conviction under s. 170 of the Penal Code.

None of these questions is altogether free from difficulty, specially as the case-law upon these and other cognate questions does not seem to have put the matter at rest, and the decision of them requires consideration both of the substantive and the adjective rules of the criminal law, that is, of the provisions of the Indian Penal Code and of the Code of Criminal Procedure.

Viewed in this light, the first point as enunciated by me is a question of the rules of criminal procedure which must of course be considered with due regard to the behests of the substantive criminal law, that is, the Indian Penal Code. Now there is nothing

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either in s. 170 or in s. 384 of that Code which can be understood to lay down the rule that a person guilty of one offence may not at the same time be guilty of the other, and both sections by using the word "*shall*" indicate the imperative mandate of the Legislature that persons guilty of those offences are to be punished, a direction of the law which is in keeping with the general principles of jurisprudence. There is, indeed, another section of the same Code which has a bearing upon such matters, and that section is s. 71, which governs the whole Code and regulates the limit of punishment in case in which the greater offence is made up of two or more minor offences. The section, however, is not a rule of adjective law or procedure, but a rule of substantive law regulating the measure of punishment, and it cannot, therefore, affect the question of conviction, which relates to the province of procedure.

The Code of Criminal Procedure, therefore, is the law which must be referred to. S. 35 of that Code distinctly provides that separate sentences may be passed in cases of conviction for several offences at one trial, and the provisions of s. 235 of that Code are in keeping with the earlier section; and illustration (*g*) of the latter section shows that in one and the same trial there may be separate convictions for separate offences, though such convictions may arise from facts of the same transaction and proceed upon the same evidence. Indeed, para. III of s. 235 of the Criminal Procedure Code distinctly contemplates the trial of the accused for separate offences where the acts complained of, when combined, would constitute a different offence.

These provisions leave no doubt in my mind that in a case such as this the Magistrate was right in trying the accused both under s. 170 and s. 384 of the Indian Penal Code, and in convicting the accused for both offences. The question as to the measure of punishment is a different matter from the question of conviction and rests upon other considerations both of law and fact. There is, however, a note in Mr. Justice Prinsep's commentary on the Code of Criminal Procedure Code (8th ed., p. 33), under s. 35, which states that the Calcutta High Court has held that when there are in an indictment two separate offences supported by distinct and separate evidence, a separate sentence should be passed

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for each offence, the punishment under the second sentence to take effect on the expiry of the first, and that if, however, there are two or more offences supported by the same evidence, or very nearly so, a verdict of *guilty* should be entered on the offence covered by the greater portion of the evidence as the gravest in the eye of the law, and a verdict of *not guilty* on the other charges. The case in which this rule was laid down does not appear in the published reports, and the reasons on which the ruling proceeded are not, therefore, available to me. But I confess, with due respect, that I am unable to accept the rule so laid down. I have already said that the question of conviction is distinguishable from the question relating to the measure of punishment, that is, the sentence to be passed. The latter may, indeed, be affected by s. 71 of the Indian Penal Code, or by s. 35 of the Code of Criminal Procedure: in the former case by a rule of substantive law, in the latter by a rule of adjective law. But I am unable to see how the mere circumstance that a series of acts which constitute a minor as also a graver offence, when proved against an accused person who has been charged with and tried for both the offences, can result in a finding of "*not guilty*" of the minor offences any more than of the graver offence. So far as I am aware, there is nothing in the Code of Criminal Procedure to justify such a course, and s. 71 of the Indian Penal Code cannot be understood to regulate convictions, though of course it governs the question of sentence as a matter of substantive criminal law. The view expressed by the Madras High Court, in their proceedings of the 4th July, 1867 (Weir, p. 43), is that when a prisoner is tried on several heads of charge, the most convenient course, with reference to appeals, is to enter up findings on all the counts, though when the several heads of charge are all founded on one continuous transaction, punishment can only be awarded on one. It seems to me that where certain acts constitute more than one offence, whether such offences do or do not fall under the purview of s. 71 of the Indian Penal Code, and the accused is charged and tried for more than one offence and the evidence establishes those offences, the Court is bound to convict him of those offences, though in awarding punishment the provisions of s. 71 of the Indian Penal Code and of s. 35 of the Code of Criminal Procedure

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would of course have to be duly kept in view. I have already said that the question of conviction is a question of adjective law or procedure, and that when an offence provided for by the substantive law is proved, a conviction must follow in the absence of express provisions to the contrary in the law of procedure itself. I am not aware of any such provision in our Code of Criminal Procedure, and the nearest approximation to such a rule are the provisions of s. 240 of that Code, which lay down that when more charges than one are made against the same person and a conviction has been had on one or more of them, the prosecution may, with the consent of the Court, withdraw the remaining charge or charges, or the Court may stay their trial. That section, however, does not apply to this case, and I hold that the Magistrate was right, upon the evidence before him, in convicting the accused both under s. 170 and s. 384 of the Indian Penal Code.

This leads me to the second question, namely, whether the Magistrate acted rightly in passing what he calls concurrent sentences of nine months' rigorous imprisonment. I am of opinion that there is no authority in the law to justify such a course. Indeed, the provisions of s. 35 of the Code of Criminal Procedure render such a course illegal. The first paragraph of that section provides that "when a person is convicted, at one trial, of two or more distinct offences, the Court may sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict: such punishments, when consisting of imprisonment or transportation, *to commence the one after the expiration of the other in such order* as the Court may direct." In this case the sentences passed by the Magistrate consisted of imprisonment, and such sentences could not, therefore, be made to "*run concurrently*" as directed by the Magistrate, the phrase "*in such order as the Court may direct*" not being susceptible of such interpretation as the Magistrate has apparently placed upon it. I hold therefore, that the order of the Magistrate, so far as it directed that the two sentences were to run concurrently, was illegal.

I have now to consider the third question, namely, whether the learned Sessions Judge was right in law in declining to pass any sentence in respect of the conviction under s. 170 of the Indian

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Penal Code. I am of opinion that such an omission was illegal. Just as the maxim *ubi jus ibi remedium* is a rule of jurisprudence, so it is a principle of the criminal law that where there is an offence there must be a punishment, the general rule being in either case affected by exceptional provisions of the law, whether provided by statute or by some other legal authority, disturbing the uniformity of the application of general maxims. No such provision or authority is to be found in our criminal law, whether belonging to the domain of substantive law or of adjective law. Indeed, the provisions of s. 170 of the Indian Penal Code itself are imperative, and they leave no room for doubting that whoever commits the offence prescribed by that section must undergo punishment according to the behests of that section, read, of course, as it must be read, with the general rule contained in s. 71 of that Code. Upon the point, I think the ruling of the Madras High Court, in their proceedings of the 15th January, 1869 (1), is applicable in principle. There it was ruled by that Court that when a prisoner is convicted of several offences, a separate sentence should be passed in each case; and though there the trials seem to have been separate, the principle that there should be a separate sentence for each conviction was not disturbed. More to the point is the ruling of a Full Bench of the Bombay High Court in *Reg.* v. *Anvarkhan* (2), where it was held that it is competent to a Magistrate to pass a separate sentence in respect of each of the two charges of house-breaking in order to commit theft, and of theft in a human dwelling, of which a prisoner is found guilty, provided the aggregate punishment awarded on the two charges does not exceed the punishment which the case warrants for the greater of the two offences of which the accused has been convicted, and provided, further, such aggregate punishment does not exceed the jurisdiction of the Court passing the sentence. This also is the effect of the ruling of Turner, J., in *Empress* v. *Budh Singh* (3), where that learned Judge pointed out that "the law does not prohibit the Court from passing sentence in respect of each offence established, but it declares that the offender must not receive for such offence collectively a punishment more severe than

(1) 4 Mad. H. C. Rep. App. XXVII. (2) 9 Bom. H. C. Rep. 172.
(3) I. L. R. 2 All. 101.

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might have been awarded for any one of them, or for the offence formed by their combination." Again, much to the same effect is the ruling of the Bombay Court in *Reg.* v. *Murar Trikam* (1), where it was held that when more than one offence is proved, it is not proper to convict only of one and to acquit of the other, although the offences may be cognate. This view of the law is much the same as that held in *Reg.* v. *Gulam Abbas* (2), and again, by the same Court, in a later case, *Reg.* v. *Tukaya bin Tamana* (3), but the view it not altogether consistent with the ruling of the Madras Court in the case of *Noujan* (4) and of this Court in *Queen* v. *Mungroo* (5). The ruling of the Calcutta High Court in *Empress* v. *Jubdur Kazi* (6) appears to throw doubt on the view which I have taken, but that ruling, like the others, refers to the provisions of the old Criminal Procedure Code (Act X of 1872), which have been reproduced in s. 235 of the present Criminal Procedure Code, with the omission of such provisions relating to the measure of punishment as were alien to procedure and properly belonged to the province of substantive law.

In *Empress* v. *Ajudhia* (7) my brother Straight, dealing with the Criminal Procedure Code of 1872, expressed the view that "where in the course of one and the same transaction an accused person appears to have perpetrated several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed, yet, in the interests of simplicity and convenience, it is best to concentrate the conviction and sentence on the graver offence proved." Proceeding upon this view, my learned brother, in dealing with that case, convicted the accused of house-breaking by night in order to commit theft under s. 457 and directed an acquittal upon the charge of theft in a dwelling-house under s. 380 of the Indian Penal Code. This view is no doubt in accord with the ruling of the Madras High Court in case of *Noujan* (4) to which I have already referred, for there it was

(1) 5 Bom. H. C. Rep. 3 Crown Cases.
(2) 12 Bom. H. C. Rep. 147.
(3) I. L. R., 1 Bom. 214.
(4) 7 Mad. H. C. Rep. 375.
(5) N. W. H. C. Rep. 1874 p. 293.
(6) I. L. R. 6 Calc. 718.
(7) I. L. R. 2 All. 644.

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held that the law forbids "two punishments for an offence so compounded that one substantive offence is the aim of the other and evidentiary matter of the intent necessary to constitute that other." Similar is the principle upon which my brother Straight's ruling proceeds in the case of *Queen-Empress* v. *Ram Partab* (1), where the two offences were those of being a member of an unlawful assembly causing riot, and inflicting grievous hurt. This ruling was, however, dissented from by my brother Brodhurst in *Queen-Empress* v. *Dungar Singh* (2), and by the learned Chief Justice and my brother Brodhurst in *Queen-Empress* v. *Bisheshar* (3), which, so far as I know, is the latest ruling of this Court on the subject.

Having considered the various cases to which I have referred, I cannot help thinking, with due respect, that the main reason why such conflict of decision has arisen is confusion between the rules of law regulating the conviction and those which regulate the measure of punishment. An act or a series of acts which in the eye of the substantive criminal law constitute an offence, punishment wherefor is imperatively demanded by the law, must, when duly proved against the accused, result in a conviction; and whenever there is conviction, it follows, as a natural sequence of legal thought, that there must be a punishment, for otherwise the definition of "*offence*" in s. 40 of the Indian Penal Code would be scarcely intelligible. I am not aware of any rule of our law that an offence when charged and proved against the accused is to result either in a verdict of *not guilty* or to pass unpunished, whether such an offence is or is not accompanied by another offence, and whether such latter offence does or does not overlap or include the former. I have already said enough to indicate that, in my opinion, s. 71 of the Indian Penal Code has no bearing upon the question of convictions, but relates only to the measure of punishment for offences falling under the purview of that clause. I have also said enough to indicate that, according to my view of the law, neither s. 35 nor s. 235 of the Criminal Procedure Code stands in the way of separate convictions and separate sentences for each offence of which the accused is found guilty in the same trial, though, as a matter of substantive law, s. 71 of the Indian Penal Code affects

(1) I. L. R. 6 All. 121. (2) I. L. R. 7 All. 29.
(3) I. L. R. 9 All. 645.

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the measure, or, rather the limit, of punishment, and, as a matter of adjective law, s. 35 of the Criminal Procedure Code has a bearing upon the same question with reference to the powers of the Court awarding the sentence, and with reference to the right of appeal.

Applying these views to the present case, I am of opinion that there is no rule of our criminal law which would enable the Court, after finding the accused guilty of an offence, to refrain from passing a sentence on him as punishment for such offence, and therefore the learned Sessions Judge was wrong in law in omitting in this case to pass a sentence upon the accused after having found him guilty under s. 170 of the Indian Penal Code.

It now remains for me to consider whether, in the exercise of the revisional powers of this Court, I should disturb the amount of sentence passed upon the accused. The decision of this question again is partly dependent upon considerations of law, though it relates only to the measure of the punishment to be awarded. The question of law is whether, under the circumstances of this case, the offence of personating a public servant under s. 170 was such as would be included in the offence of extortion as defined in s. 383 and made punishable under s. 384 of the Indian Penal Code. The first paragraph of s. 71 provides that "where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided." This rule is illustrated in the Code itself by illustration (*a*) to the section, and it is clear that it does not apply to the present case, because the offence of personating a public servant under s. 170 is not any part of the offence of extortion to which ss. 383 and 384 relate. Nor is the second paragraph of s. 71 applicable, because neither of the two offences with which this case is concerned falls under several definitions. The question, then, is whether the case falls under the third part of s. 71—in other words, whether the present case is one "where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence;" because in such cases the section provides that "the offender shall not be punished with a more severe punishment

than the Court which tries him could award for any one of such offences."

Now I am aware that it has been held in some cases that for the decision of this question the identity of the evidence produced in support of the prosecution is the criterion, but I confess I am unable to adopt this view. S. 71, as I have already said more than once, is a rule of substantive law, and, as such, must be understood to refer to substantive provisions and not to matters of evidence. The phrase "*constitute an offence*" as it occurs in the section must be understood to refer to the definitions of the offences as enunciated in the Code itself, irrespective of the identity or non-identity of the evidence whereby the several acts are proved. In this view of the law, the offence of personating a public servant under s. 170 cannot be dealt with as a constituent element of the offence of extortion as defined in s 383 of the Code, even though, as in this case, the evidence shows that but for the former offence the latter offence could not have been successfully committed. In other words, the evidence in this case shows that but for personating a public servant, the accused could not practically have had the means of putting any person in fear of injury, which is an essential element of extortion; but I hold that this circumstance does not bring the two offences within the purview of the latter part of s 71 of the Indian Penal Code. The reason for this view is that the offence under s. 170 was complete as soon as the accused falsely pretended to be a public servant as an octroi officer, and in such an assumed character called upon Ram Charan, *teli*, to show proof of the payment of octroi duty, and threatened him with injury. The offence thus being complete in itself, it could not merge into the offence of extortion under s. 383, of which offence personation as a public servant forms no necessary ingredient. Indeed, the offence of extortion as defined in that section may be practised, and is often practised, by private individuals assuming no pretended authority as public servants, and the mere circumstance that in this case personating as a public servant was utilized as a means of extorting money will not merge the two offences into one or entitle the accused to escape conviction under both offences. In other words, I hold that it is not to the identity or non-identity of the evidence, nor merely to the individual facts of each case as to

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the practicability of the offence, but to the definitions of offences as to the elements of the *corpus delicti*, that we must look for deciding the question as to the applicability of the latter part of s. 71 of the Indian Penal Code for purposes of assessing punishment. And inasmuch as the accused in this case has been found guilty both under s. 170 and s. 384 of the Indian Penal Code, separate sentences should have been awarded, irrespective of the provisions of s. 71 of the Indian Penal Code, but with due regard to the provisions of s. 35 of the Code of Criminal Procedure Code. The provisions of that section, however, do not affect this case, as the Magistrate who tried the accused was a Magistrate of the first class, and, as such, empowered to pass the sentences which he did.

For these reasons I uphold both the convictions of the accused, that is, his convictions under s. 170 and s. 384 of the Indian Penal Code, and setting aside so much of the order of the learned Sessions Judge as omits to pass a sentence under s. 170 of the Indian Penal Code, I direct that the record be so amended as to sentence the accused to three months' rigorous imprisonment on the conviction under s. 170 of the Indian Penal Code, and to six months' rigorous imprisonment on the conviction under s. 384 of the Indian Penal Code, the latter sentence to commence after the expiration of the former. And I may add that I have so apportioned the punishment, because the former offence, though the original one, was subsidiary to the latter offence, and although but for the former offence the latter might on the facts of this case have been impracticable, the latter is the graver offence in the eye of the law.

The effect of this amendment of the record does not alter the extent of punishment awarded in this case, as I do not think that the two offences when combined in this manner require a severer punishment. And I have dwelt upon the questions of law at such length because if the two offences of which the accused has been convicted required severer sentences than the aggregate amount of nine months' rigorous imprisonment, I should have felt it my duty, in the exercise of the revisional powers of this Court, to award such punishment on each of the two convictions as would in the aggregate exceed the limit of nine months' rigorous imprisonment.

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I wish to add that what I have said as to separate convictions requiring separate sentences must not be understood to lay down any rule as to cases in which the accused is charged with, tried for, and convicted of only one offence, and the facts proved might, if taken piecemeal, constitute minor offences forming ingredients of the graver offence of which the accused has been found guilty. In such cases only one sentence would, of course, be all that is required by the law.

Convictions affirmed; sentences altered.

APPELLATE CIVIL.

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October 26.

Before Mr. Justice Straight and Mr. Justice Mahmood.

SARJU PRASAD AND ANOTHER (JUDGMENT-DEBTORS) v. SITA RAM (DECREE-HOLDER.*)

Limitation—Execution of decree—Application for execution withdrawn by decree-holder—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4)—Civil Procedure Code, ss. 373, 374, 647.

S. 647 of the Civil Procedure Code makes ss. 373 and 374 applicable to proceedings in execution of decree *Kifayat Ali v. Ram Singh* (1) and *Pirjadi v. Pirjade* (2) followed. *Turachand Megraj v. Kashinath Trimbak* (3) and *Ramanandan Chetti v. Periatambi Shervai* (4) dissented from.

A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings.

Held that, with reference to the second paragraph of s. 373 read with s. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application presented five years after the decree barred by limitation, with reference to art. 179 of the Limitation Act.

THIS was a reference to a Division Bench by Mahmood J. The facts are sufficiently stated in the order of reference, which was as follows :—

MAHMOOD, J.—The facts necessary for the decision of the main question of law raised by the argument of the learned pleader for

* Second Appeal, No. 2245 of 1886, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 8th September, 1886, modifying a decree of Babu Mritunjoy Mukerji, Subordinate Judge of Benares, dated the 2nd July, 1886.

(1) I. L. R. 7 All. 359. (3) I. L. R. 10 Bom. 62.
(2) I. L. R. 6 Bom. 681. (4) I. L. R. 6 Mad. 250.

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the appellant are these. The decree sought to be executed was passed on the 22nd May, 1878, and an application for execution thereof was made on the 14th February, 1881, and such application having been made more than one year after the decree, a notice was issued to the judgment-debtor on the 25th June, 1881; but the application was objected to by the judgment-debtor upon the ground that it was not in due form, and the calculation contained therein was erroneous. Thereupon the decree-holder's pleader stated to the Court that the prosecution of the application was not then desired, and that the execution case might be struck off, and the decree, which had been filed with the application, might be returned. The Subordinate Judge thereupon struck off the case and directed that the decree should be returned to the decree-holder, which appears to have been done.

The present litigation has arisen from an application made by the decree-holder on the 14th February, 1884, and it was met by a plea that the previous application of the 14th February, 1881 having been withdrawn on the 24th December, 1883, the present application was barred by limitation. The Court of first instance disallowed the objection, upon the ground that the present application for execution, having been filed within three years from the preceeding application, was within limitation. Upon appeal, the learned Judge has upheld the order of the first Court, and the main point raised in second appeal is whether the action of the decree-holder in having the former application struck off on the 24th December, 1883, bars the present application.

The determination of this question seems to depend upon the following points:—

(1) Whether ss. 373 and 374, read with s. 647, of the Civil Procedure Code, are applicable to applications for execution of decree.

(2) If so, whether the withdrawal of the decree-holder from presenting his former application of the 14th February, 1881 renders that application unavailable for the purpose of limitation under cl. (4) of art. 179, sch. ii of the Limitation Act (XV of 1877).

(3) Whether the notice issued to the judgment-debtor on the 25th June, 1881 was, under the circumstances, such notice as

cl. (5), art. 179, sch. ii of the Limitation Act contemplates for the purposes of calculating limitation.

Upon the two first points there is a conflict of decisions. Whilst the ruling of the Madras High Court in *Ramanandan Chetti* v. *Periatambi Sherwai* (1) tends to show that an application for execution, though informal and not prosecuted, but returned for amendment, is sufficient to save limitation, the Bombay High Court held a contrary view in *Pirjade* v. *Pirjade* (2) by applying s. 374 read with s. 647 of the Code to applications for execution of decree, and this last case was followed by Oldfield, J., with my concurrence, in *Kifayat Ali* v. *Ram Singh* (3). But in a more recent case, Sargent, C. J., in *Tarachand Megraj* v. *Kashinath Trimbak* (4), dissented from the rule laid down in *Pirjade* v. *Pirjade* (2) and held that the provisions of ss. 373 and 374 were not applicable to applications for execution, notwithstanding s. 647 of the Code, and that, therefore, even an application for execution which has been withdrawn by the decree-holder with permission to apply again was not affected for purposes of limitation under cl. (4), art. 179, sch. ii of the Limitation Act; and in laying down this rule, the learned Chief Justice relied upon the principle of a Full Bench ruling of the Calcutta High Court in *Eshan Chunder Bose* v. *Prannath Nag* (5). Under this state of the law, I do not think that the questions involved in the two first points are free from difficulty.

Again, so far as the third point is concerned, the ruling of this court in *Behari Lal* v. *Salik Ram* (6) is important; but in that case, there being a difference of opinion between Pearson and Spankie, JJ., the appeal was referred to Oldfield, J., under s. 575 of the Civil Procedure Code (Act X of 1877), and the last-named Judge disposed of the case by agreeing with Pearson, J., but without consulting the two learned Judges who had differed in opinion—a procedure which, according to the latest interpretation of that section in *Rohilkhand and Kumaun Bank, Limited*, v. *Row* (7) was not in strict accord with the intention of the Legislature in framing that section. Moreover, the ruling in that case impugned an

(1) I. L. R. 6 Mad. 250.
(2) I. L. R. 6 Bom. 651.
(3) I. L. R. 7 All. 359.
(4) I. L. R. 10 Bom. 62.
(5) 22 W. R. 512.
(6) I. L. R. 1 All. 675.
(7) I. L. R. 6 All. 468.

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earlier ruling of this Court in *Franks* v. *Nuneh Mal* (1), and, under the circumstances, I can scarcely regard the points in this case as definitely settled by the case-law.

I may also add that in some recent cases the Lords of the Privy Council have applied the principles of the rule of *res judicata* as defined in s. 13 of the Civil Procedure Code to proceedings in execution of decrees, and those cases were referred to by Field, J., in *Bandey Karim* v. *Romesh Chunder Bundopadhya* (2); but that learned Judge went on to say:—"We do not, on the present occasion, propose to go into this broad, general, and probably difficult question, whether the principal of *res judicata* as enunciated in s. 13 of the Code of Civil Procedure applies in all its generality to proceedings after decree." It seems to me that, so far as our Civil Procedure Code is concerned, probably the only authority by which the rule of *res judicata* as contained in s. 13 of the Code can be applied to execution cases is s. 647 of the Code; and if this is so, there seems analogical reason for holding that the provisions of ss. 373 and 374 of the Code would also be applicable to such cases, without interference with the provisions of art. 179, sch. ii. of the Limitation Act. But I do not think that I should, sitting here as a single Judge, dispose of these important questions of law, notwithstanding the conflict of decision which I have pointed out, and indeed if I had the power under the Rules of this Court to refer the case to the Full Bench, I should probably have done so. But under the Rules of the 11th June 1887, I can only refer this case to a Division Bench consisting of two Judges, and I do so accordingly.

Lala *Juala Prasad*, Munshi *Hanuman Prasad*, and Munshi *Madho Prasad*, for the appellants.

Munshi *Kashi Prasad* and Lala *Lalta Prasad*, for the respondent.

STRAIGHT, J.—This is a second appeal from an order of the Judge of Benares, passed on the execution side, on the 8th September, 1886. The execution proceedings in which it was passed had reference to a decree, dated the 22nd May, 1878, and the application for execution with which it deals was dated the 14th

(1) N.-W. P., H. C. Rep. 1875 p. 79. (2) I. L. R. 9 Calc. 65.

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February, 1884. The whole question involved in this appeal is whether that application of the 14th February, 1884 is prohibited by any rule of procedure or of limitation, which the lower Courts have held it is not.

The first application for execution of the decree was made upon the 14th February, 1881, and it is in reference to that application and to what took place upon it that the questions involved in the discussion that has taken place before us are concerned. It seems that after notice of that application of the 14th February, 1881 had been given to the judgment-debtor, he appeared and objected to the form of the application upon the ground that there had been a miscalculation in the application as to the amount covered by the decree in respect of which execution was sought. And it seems there can be no doubt that there was a miscalculation, because such was admitted to be the case by the pleader for the decree-holder. Accordingly, on the 24th December, 1883, the application having been pending in the Court for that long period of time, an order was made by the Court, the terms of which it is not necessary for me to recapitulate at length, but they have been explicitly translated for my benefit by my brother Mahmood, and they come to this, that the application was struck off at the request of the decree-holder's pleader, and that the copy of decree which had been filed with the application was returned to him. It is to be observed that in that order of the Court it is recited that the decree-holder's vakil stated in terms that "for the present we are not anxious to carry on the execution proceedings, and we therefore apply that the case may be struck off." That being so, I now come to the application with which we are more immediately concerned, *viz.*, that of the 14th February, 1884. And I have to consider whether, having regard to what took place in respect of the application of the 14th February, 1881, we can adopt and act upon and we ought to adopt and act upon the provisions contained in ss. 373 and 374 of the Civil Procedure Code; because if those provisions are applicable to this case, then undoubtedly the Courts below were wrong in allowing the execution of the decree, and the decree cannot be executed. Now I do not hesitate to say, and in making the remark I am only recapitulating what I have hitherto always desired to lay down in these matters, that I am

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anxious, as far as I possibly can, to have introduced into the conduct of execution proceedings as much of the regularity and precision of procedure as is applicable to the trial of original suits as is reasonably possible; and s. 647 of the Civil Procedure Code contemplates the adoption by the Courts, as far may be applicable, of the formalities of procedure, so that in the transaction of their miscellaneous business they may have certain well-understood landmarks—if I may so call them—to guide them in the conduct of that branch of their judicial work. Speaking generally, it seems to me that the assimilation of the provisions of ss. 373 and 374 to execution proceedings is highly desirable, and with the profoundest respect for the learned Chief Justice of Bombay, Sargent, C. J., and for the view he expressed in *Tara Chand Megraj* v. *Kashinath Trimbak* (1), I fail myself to see how, by importing the provisions of those sections of the Code into execution proceedings, any violence will be done to the terms or the operation of art. 179 of the Limitation law. It seems to me that while on the one hand it is perfectly possible to have an application for execution made in accordance with law which will render the terms of art. 179 of the Limitation Act perfectly and properly applicable, so on the other it is equally possible to have such a condition of things as an application for execution made and withdrawn under s. 373, in which state of things the limitation of art. 179 of the Limitation Act will not be applicable, because no application in accordance with law has been made, whereas the special limitation of s. 374 of the Civil Procedure Code will be applicable. Therefore, as I said before, I do not myself see that there will be any conflict between the sections of the Civil Procedure Code to which I have referred and art. 179 of the Limitation Act. Now, looking to the terms of the order of the Court passed in this matter upon the 24th December, 1883, it is obvious not only that the pleader for the decree-holder knew that there were defects in his application, but further, he in explicit terms stated that he did not desire, for the present, to proceed with the execution: and I confess that it would seem to me to be almost a contradiction in terms to say that an application dealt with as this was, was an application for execution in accordance with law, such as would save the course of ordinary limitation running. On

(1) I. L. R., 10 Bom. 62.

the contrary, it seems to me that the state of facts, as they appear from the terms of that order, are such that we are fully warranted in applying s. 373 of the Civil Procedure Code, if it is applicable to what took place in respect of the application of the 14th February, 1881, and I myself have no doubt whatever, reading s. 647 of the Code in conjunction with ss. 373 and 374 of the Code, that those sections are applicable. Moreover, I am fortified in this view by the opinion expressed by my late brother Oldfield and approved by my brother Mahmood in the case of *Kifayat Ali* v. *Ram Singh* (1), and I am prepared unhesitatingly to follow that ruling, and accept the principle therein laid down, that s. 373 of the Civil Procedure Code is applicable to execution proceedings, so far as may be. With regard to that case of my brothers Oldfield and Mahmood, I may further say that they therein adopted a ruling of the Bombay High Court, in *Pirjade* v. *Pirjade* (2), and it seems to me that the reasoning of Melville, J., as stated in his decision in that case, is of a character to commend itself to one's better judgment, and I approve the grounds on which he proceeded. While he seems to me conclusively to point out why there need be no conflict or hostility between the provisions of the Civil Procedure Code and the Limitation Act, the learned Chief Justice of the Bombay High Court, Sargent, C. J., although he seems to indicate that there may be some such conflict, does not point out what that conflict is.

Adopting the view of the two judgments I have mentioned, how does it meet the circumstances of this case, and what portion of s. 373 of the Code fits in to the particular circumstances of the case?

As regards the first paragraph of that section, it is clear that it has no applicability at all, because no leave or sanction was given by the Court to the withdrawal of the application of the 14th February, 1881, with leave to institute fresh proceedings upon the same basis. But paragraph 2 of s. 373 of the Code undoubtedly does apply to the circumstances, in my opinion. The application was withdrawn at the instance of the pleader for the decree-holder, and with the distinct intimation that "for the present we are not anxious to carry on the execution proceedings;" but no permission was given to withdraw with leave to take fresh proceedings. I am

(1) I. L. R., 7 All. 359. (2) I. L. R., 6 Bom. 681.

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of opinion, and disposed to think, that the prohibition contained in the latter portion of that section's second paragraph has application; that it was not open to the decree-holder to make the application which he has now made.

But further than that, even if one can assume here for a moment that permission is to be inferred from the action of the Court in returning the petition for execution to decree-holder, s. 374 of the Code, with its specific and special limitation steps in, and the present application of the 14th February, 1884 would be barred, because it was not made within three years from the date of the decree, the application of the 14th February, 1881 having become a nullity by reason of the withdrawal of the petition.

So it must be looked upon that there was an unbroken interval of time from the date of the decree, 22nd May, 1878, till the 14th February, 1884, when the application, now the subject-matter of appeal, was presented before the Subordinate Judge. That being so, it seems to me that this present application is undoubtedly barred, and that the decree-holder is not entitled to pray in aid the proceedings which commenced in 1881 and terminated in 1883. What I mean to say is this, that all that took place with regard to the proceedings commencing on the 14th February, 1881, and ending on the 24th December, 1883 must be struck out, and they cannot be regarded as constituting an application on which the decree-holder can rely. This being the view that I take of the matter, it seems to me that this appeal ought to be decreed, and I, therefore, decree the appeal and, reversing the orders of the Courts below, hold that the application of the decree-holder for execution should be dismissed, and the judgment-debtors are entitled to have their costs in all the proceedings.

MAHMOOD, J.—I am of the same opinion, and as my learned brother has already stated the various aspects of the questions of law which induced me to refrain from deciding the case myself, sitting as a single Judge, and to refer it to a Division Bench consisting of two Judges, I need not say much. I have only to say that it seems to me that, upon general principles, all rules of procedure or adjective law which provide pleas in bar to the action are rules of convenience which should be applicable as much to all

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miscellaneous proceedings (be they in the nature of applications for execution or any other class of applications) as they are applicable to regular suits. To take as an example the plea of *res judicata*: it is based upon the maxim "*Nemo debet bis vexari pro una et eadem causa*," which is a maxim of wider application and has application to regular as well as miscellaneous proceedings. For why should a judgment-debtor be harassed twice, unless there is a reason admitting of explanation that the second application is not in fact a harassing twice? Such as the decree not being paid off at all or only partially satisfied, in which case the doctrine of *res judicata* will not apply, for reasons into which I need not enter in detail for the purposes of this case. But where no such explanation is given the doctrine will apply; as in the two cases to which I alluded in my order of reference it has been laid down that *res judicata* is applicable to orders made in execution proceedings. But this is no longer an open question for the Courts in India, after the expression of opinion of their Lordships of the Privy Council that the law of *res judicata* is applicable to execution proceedings. I have said so much about the rule of *res judicata* because, so far as I can see, the operation of other pleas in bar of an application or a suit, such as ss. 373 and 374 of the Civil Procedure Code contemplate, and upon which sections my brother has already fully dwelt, fall under the same category as the plea of *res judicata*, because they are all pleas *in limine* barring the action. My learned brother has already said that the operation of those two sections is almost imperatively required, not only by the express terms of s. 647 of the Civil Procedure Code, but also by the general principles of convenience and regularity of proceedings. There is, of course, a conflict of decisions, to which my referring order alludes, and it simply comes to this, that the learned Judges who decided the case of *Pirjade* v. *Pirjade* (1), and which was followed by Mr. Justice Oldfield and myself in the case of *Kifayat Ali* v. *Ram Singh* (2), took one view of the matter—a view approved by my learned brother Straight—and the Madras case of *Ramanandan Chetti* v. *Periatambi* (3) and the present Chief Justice of Bombay took the opposite view. It was, indeed, out of respect due to the learned Chief Justice of Bombay, and also to the view taken by the Madras Court, that I did not undertake

(1) I. L. R., 6 Bom. 681. (2) I. L. R., 7 All. 359.
(3) I. L. R., 6 Mad. 250.

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the responsibility of deciding the case myself. I have, however, no longer any doubts left now. If it is a true doctrine, regulating the principle upon which the rules of procedure should proceed, that those rules aim at facilitating the administration of justice by promoting the convenience of the parties by preventing recurrence and repetition of points already adjudicated upon, there is no reason why all the principles contained in Chapter XXII of the Civil Procedure Code should not be applied to execution proceedings. Indeed, as one who has acted as a Court of first instance in the mufasal for some time, I have applied the provisions contained in that chapter to proceedings in execution. And if that chapter were not applicable to such proceedings, there would scarcely be any provisions to enable the parties to a decree to enter into any compromise. I have added these few remarks simply because the case has taken up the time of two Judges instead of one. I entirely concur in the order of my learned brother Straight.

Appeal allowed.

1885
November 3.

APPELLATE CIVIL.

Before Mr. Justice Straight.

KIRPA DAYAL (PETITIONER) *v.* RANI KISHORI AND OTHERS (OBJECTORS).*

Temporary injunction—Civil Procedure Code, s. 492—"Wrongfully" sold in execution of decree.

An objection made under s 278 of the Civil Procedure Code to the attachment in execution of a decree of a mortgage bond of which the objector claimed to be the assignee from the judgment-debtors under an instrument dated prior to the attachment was disallowed; and the objector then brought two suits against the decree-holder and the judgment-debtors, in which he claimed (*a*) a declaration of his right to the bond, and (*b*) to recover a sum of money from the judgment-debtors on the basis of the assignment. The first Court dismissed both suits, on the ground that the alleged assignment was a collusive transaction entered into after the attachment between the objector and the judgment-debtors for the purpose of defeating the attachment. Pending an appeal to the High Court, the objector applied to that Court for a temporary injunction under s 492 of the Code, restraining the decree-holder from bringing the bond to sale in execution of the decree.

Held that although in such cases the provisions of s. 492 should be applied with the greatest care, one of the objects of the Legislature in passing that section was to guard as far as possible against multiplicity of suits, and as

* Application in F. A. No. 107 of 1884 under s. 492 of the Civil Procedure Code.

many complications probably resulting in further litigation were likely to arise if the decree-holder were allowed to proceed with the execution-sale, and no practical injury to anyone would be caused by restraining her from so doing until the decision of the appeal, a temporary injunction should be granted, subject to security being given by the applicant.

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *G. E. A. Ross* and Pandit *Bishambhar Nath*, for the appellant.

Munshi *Hanuman Prasad* and Babu *Ratan Chand*, for the respondents.

STRAIGHT, J.—This is an application for an interim injunction under s. 492 of the Civil Procedure Code. The following are the circumstances under which it has been preferred:—Sah Kirpa Dayal, the applicant before me, is the alleged assignee by an instrument of the 17th April, 1881 of, among other things, the rights as mortgagee of the three persons, Chunni Lal, Manik Ram, and Kishen Das, under a mortgage executed on the 20th June, 1876, by one Lalk Singh, for Rs. 7,000. On the 5th May, 1881, Musammat Rani Kishori instituted a suit for the recovery of Rs. 22,926-10-6 from Chunni Lal, Manik Ram, and Kishen Das, and, on the 20th September following, obtained a decree from the Subordinate Judge of Mainpuri. While this suit was pending Musammat Rani Kishori, on the 17th May, 1881, obtained an interim attachment of the bond for Rs. 7,000 as then being in the hands of the three defendants, and subsequently, on the 13th June, a further attachment directed to Sah Kirpa Dayal, the now applicant, into whose possession it had passed, and the attachment was perfected on the 29th of the same month. Objections were then filed by Sah Kirpa Dayal, but were disposed of adversely to him, and he then instituted two suits, one against his three assignors and Musammat Rani Kishori to have the instrument of the 17th April, 1881 and his right thereto declared valid, the other to recover Rs. 19,284-3-6 from his three assignors upon the basis of the assignment—Musammat Rani Kishori upon her own application being joined as a party. Both these suits were filed in the Court of the Judge of Mainpuri, who, on the 21st August, 1882, at the instance of Sah Kirpa Dayal, issued an injunction to restrain Musammat Rani Kishori from bringing the instrument of the 17th

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April, 1881 to sale in execution of her decree of the 20th September, 1881. This order was upheld in appeal by this Court. The two suits of Sah Kirpa Dayal were subsequently tried together by the Judge of Mainpuri, who, on the 7th of June last, found that the alleged assignment of the 17th April, 1881 was in fact made after the attachment issued at the instance of Musammat Rani Kishori on the 17th May, 1881, in collusion between the three assignors and Sah Kirpa Dayal with the object of defeating such attachment, and he dismissed both the suits brought by the latter. Sah Kirpa Dayal filed an appeal in this Court from the decision of the Judge on the 28th July last, and on the 29th of the same month preferred the application which I now have to dispose of. It is not without some hesitation that I have come to the conclusion to grant it, my chief difficulty being caused by the word "wrongfully" in s. 492 of the Code under which it is presented. It seems to me that we cannot be too careful as to the mode in which we permit the machinery of the Courts to be used for the purpose of enabling a plaintiff in one suit to delay a decree-holder in another from obtaining the fruits of his judgment by executing his decree in ordinary course against the property of his judgment-debtor. At the same time it is of course most desirable to guard as far as possible against a multiplication of suits, and I presume that this was one of the objects the Legislature had in view in passing s. 492 in its present shape. I cannot but feel that if Musammat Rani Kishori is allowed to proceed with the sale of the rights and interests of her judgment-debtors under the mortgage of the 20th of June, 1876, many complications are likely to arise which would probably result in further litigation in some shape or another, whereas if she is restrained from doing so until after the appeal in this Court has been disposed of, no practical injury that I can see will result to any one. I am considerably influenced in taking this view by the circumstance that my brothers Brodhurst and Tyrrell sanctioned the injunction granted by the Judge of Mainpuri, when the suit was in its original stage, as also by the fact that in First Appeal No. 113 of 1881, a not dissimilar case (1), my brother Oldfield adopted a similar course to that which I propose to follow. Upon the applicant Sah

(1) Not reported.

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Kirpa Dayal executing a bond with two sureties for Rs. 10,000 by way of security, let an interim injunction issue to the Subordinate Judge of Mainpuri, directing him not to hold the sale of the instrument for Rs. 7,000 executed by Laik Singh and dated the 20th June, 1876, until he has received notice from this Court that this injunction has been dissolved.

The costs of this application will be costs in the cause (1) (2).

Application granted.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

1887 *November* 3.

MULCHAND (JUDGMENT-DEBTOR) v. MUKTA PRASAD (DECREE-HOLDER).*

Execution of decree—Sale in execution pending appeal from decree—Application for confirmation of sale after reversal of decree—Court not competent to grant confirmation—Civil Procedure Code, s. 312.

Where a sale in execution of a decree has taken place pending an appeal, and the decree has subsequently been reversed, the Court executing the decree cannot, after such reversal, grant confirmation of the sale. *Basappa bin Malappa Ahi* v. *Dundaya bin Shivlingaya* (3) referred to.

THIS was an appeal from an order of the Munsif of Cawnpore granting confirmation of a sale in execution of a decree held by the respondent against the appellant. The sale took place on the 10th August, 1886, pending an appeal to the High Court from the decree. The appeal to the High Court was allowed and the decree reversed on the 5th November, 1886, before the purchaser (who was the decree-holder) made his application (dated the 20th March, 1887) for confirmation of the sale. The Munsif was of opinion that he had no power to refuse such confirmation. He therefore allowed the application, observing:—"I cannot help remarking that this is rather a hard case for the judgment-debtor. The decree in execution of which this sale took place has now been set aside by the hon'ble the High Court. The law as it at present stands does not allow us to interfere with a sale of this nature,

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* First Appeal No. 88 of 1887 from an order of Babu Nilmadhab Rai, Munsif of Cawnpore, dated the 30th March, 1887.

(1) See also *Ganga Nand* v. *Balgobind Das* and *Bahuria Manraj Kuari* v. *Maharajah Prasad Singh* (Weekly Notes, 1884, pp. 349, 352).

(2) On the 3rd November, 1885, the appeals in both suits came on for hearing before Petheram, C. J., and Tyrrell, J., who ordered a retrial on the principle laid down in *Jagram Das* v. *Narain Lal*, I. L. R. 7 All. 857. See *Jadu Rai* v. *Kamtzak Husain*, I. L. R. 8 All. at p. 586.

(3) I. L. R. 2 Bom. 540.

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which is otherwise regular; and however inadequate the price may be of a house sold in auction, we have no power to interfere if the application is not based upon the ground of material irregularity in publishing or conducting the sale."

The judgment-debtor appealed to the High Court.

Mr. *G. E. A. Ross*, for the appellant.

Babu *Dwarka Nath Banerji* and Munshi *Ram Prasad*, for the respondent.

STRAIGHT, J.—This appeal relates to an application made to the Munsif of Cawnpore for confirmation of a sale which took place on the 10th August, 1886. I have not before me the date of the decree in execution of which the sale was held, whereat the respondent decree-holder purchased; but it is sufficient for the purposes of this case to state that the sale of the 10th August, 1886, took place while an appeal from that decree was pending in this Court, which appeal was heard on the 5th November, 1886, and the result of that appeal was that the decree obtained by the respondent against the appellant was reversed and his suit was dismissed. The decree-holder, notwithstanding this dismissal of his suit in appeal, on the 20th March, 1887, applied for confirmation of the sale at which he had purchased on the 10th August, 1886, and that confirmation has been granted by the Munsif.

It is from that order of the Munsif that the appeal is now preferred, and the single and simple position taken up for the judgment-debtor is that the Munsif should not have confirmed the sale, because, the decree having been set aside before application had been made for confirmation of the sale, the warrant for the sale was at an end.

I have no doubt that this is a sound contention. The Civil Procedure Code contemplates that, before a sale shall become absolute for the purpose of laying the foundation for the grant of a sale certificate, it must be confirmed, that is to say, the Court executing the decree must be satisfied before confirming not only that the sale was a good sale in advertence to the language of s. 311 of the Code, but that there was before him a subsisting decree with the execution of which he ought to proceed by granting confirmation. In the present instance the Munsif had direct notice on

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the 30th March, 1887, when he made the order the subject of this appeal, that the decree in execution of which the sale of the 10th August, 1886 had taken place had been set aside. I do not think that a Court executing a decree ought to make an order under such circumstance confirming a sale.

This view of the matter is borne out and supported by a ruling of the Bombay High Court, *Basappa bin Malappa Aki* v. *Dundaya bin Shivlingaya* (1), which is directly in point to the facts of the present case, and with the reasoning contained in the judgment of the learned Judge who determined that case I entirely agree; and adopting his view, I decree this appeal with costs, and setting aside the order of the Munsif, direct that the application for confirmation of the sale of the 10th March, 1886, be dismissed with costs.

BRODHURST, J.—I concur.

Appeal allowed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

1887 *November* 7.

MANSAB ALI (DEFENDANT) v. GULAB CHAND AND ANOTHER (PLAINTIFFS).*

Bond—Interest post diem—Non-payment of principal and interest at agreed date—Limitation—Continuing breach—Act XV of 1877 *(Limitation Act), s.* 23, *sch. ii, Nos.* 115, 116.

Interest as interest cannot be allowed on money lent on a hypothecation bond, or on a deed of conditional sale, unless it appears from the bond or deed that it was intended by the parties that interest should be payable, and then only for the period during which it so appears that it was so intended. Where no such intention appears, interest can be given only by way of damages. *Cook* v. *Fowler* (2) referred to.

Upon failure to pay the principal and interest secured by a bond upon the day appointed for such payment, breach of the contract to pay is committed, and there is no "continuing breach" within the meaning of s. 23 nor "successive breaches" within the meaning of art. 115 of the Limitation Act (XV of 1877).

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Hanuman Prasad* and Mr. *J. Simeon*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

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* First Appeal No. 195 of 1886 from a decree of Pandit Ratan Lal, Subordinate Judge of Banda, dated the 31st July, 1886.

(1) I. L. R., 2 Bom. 540. (2) L. R., 7 H. L. 27.

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EDGE, C. J., and TYRRELL, J.—This is an appeal by Syed Mansab Ali, one of the defendants, from the decree of the Subordinate Judge of Bánda, dated the 31st July, 1886. The action was brought on the 24th November, 1885, upon a registered hypothecation bond, dated the 5th January, 1868, executed by the defendant Syed Mansab Ali in favour of the plaintiff Gulab Chand and one Beni Prasad, who was the agent of the plaintiff's firm of Babu Lal and Shankar Lal of Binda. The defendants Yad Ali, Karam Ali, the sons of Mir Syed Ali, deceased, and Musammat Khair-ul-nissa, the widow of Mir Syed Ali, were made defendants, as they laid claim to the hypothecated property, alleging that it was purchased by Mir Syed Ali for himself, although in the name of his eldest son, the defendant Syed Mansab Ali. The defendants Baldeo, Hazari and Chóte are the representatives of Beni Prasad mentioned in the hypothecation bond in suit. The defendants Baldeo, Hazari and Chote admitted, by their written statement filed on the 21st December, 1885, that in the transaction in question Beni Prasad was merely the agent of the plaintiffs' firm, and that the money secured by the bond was the money of the plaintiffs' firm. In the bond in question Beni Prasad is described as the gomashta of the firm of Babu Lal and Shankar Lal at Bánda. The plaintiffs claimed as against the defendants Syed Mansab Ali, Yad Ali, Karam Ali, and Musammat Khair-ul-nissa, payment of Rs. 2,300 principal money and Rs. 10,483-11 as interest from the 5th January, 1868, to the 20th November, 1885, further interest during suit and until payment, and costs, and in default of payment foreclosure and possession. The defendant Syed Mansab Ali in the first and second paragraphs of his written statement raised a defence which depended on the construction of the bond: that defence has not been supported by any argument on appeal before us. We agree with the judgment of the Subordinate Judge on that point. Mansab Ali also pleaded that Beni Prasad was a creditor in fact under the bond to the extent of one-half. That contention was not pressed before the Subordinate Judge and has not been raised before us. He also pleaded payment and an adjustment of the account. The defendants Yad Ali, Karam Ali and Musammat Khair-ul-nissa pleaded that the hypothecated property was purchased by Mir Syed Ali with his own moneys; that the

defendant Syed Mansab Ali only managed the cultivation and collections and the Court business; that Mir Syed Ali was the real owner of the property, and that Syed Mansab Ali had no power to mortgage the share of the pleading defendants. They also pleaded an arbitration and award of 1863, and that the Settlement Officer had affirmed in 1875 their right to have their names entered in the register as proprietors.

The Subordinate Judge found on all the substantial issues in favour of the plaintiffs and made a decree in their favour as against the defendants Syed Mansab Ali, Yad Ali, Karam Ali, and Musammat Khair-ul-nissa. From that decree the defendant Mansab Ali has brought the present appeal, and from it the defendants Yad Ali, Karam Ali, and Musammat Khair-ul-nissa have brought a separate appeal. The two appeals came on together to be heard by us.

On the question as to whether the defendant Syed Mansab Ali was the purchaser on his own behalf, and, at the date of the hypothecation sued on, the sole proprietor of the property hypothecated by that bond, we find in favour of the plaintiffs, agreeing substantially with the reasons and conclusions of the Subordinate Judge. The sale-deed of the 3rd January, 1860, is evidence of a sale to the defendant Syed Mansab Ali as the sole vendee. This deed might not be conclusive evidence on the point. The proceedings of the Collector's Court of Hamírpur of the 12th March, 1860, of the holding of which notice must have been previously given, refer to the defendant Syed Mansab Ali as the purchaser of the 10 annas 8 pies share in question. Dewan, one of the vendors of the 3rd January, 1860, has proved that the sale was made to the defendant Syed Mansab Ali alone, that there was no other purchaser, and that Syed Mansab Ali paid the price and got possession. The mortgage-deed of the 22nd June, 1866, the conditional sale-deed of the same date, and the sale-deed of the 11th December, 1869, show that the defendant Syed Mansab Ali was dealing with the property in question as the sole vendee and owner of it, and this subsequently to the alleged award of the 10th July, 1863. The witnesses Pershad and Gauri Shankar prove that for several years the defendant Syed Mansab Ali was the person who was in possession of the property in question.

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The evidence of the defendant's witness Jagannath, where he says that Mir Syed Ali gave the purchase-money to Basant, is contradicted by Dewan, one of the vendors, who says that it was Syed Mansab Ali who paid the price. We believe the witness Dewan. The evidence of the defendant's witnesses, Jagannath, Dhamna and Umrao, as to the persons who made the collections is at variance with the written statement of the defendants Yad Ali, Karam Ali and Musammat Khair-ul-nissa, in which they say that Syed Mansab Ali managed the cultivation and collections and the Court business, and is contradicted by the evidence of Gauri Shankar, and inferentially by that of Dewan and Pershad. The defendants have relied upon the report of the Tahsildár of pargana Mahoba of the 13th October, 1875, and the order passed on the 6th November, 1875 (documents Nos. 147 and 148). The observation which we make as to these documents is that there is nothing to show that the plaintiffs were aware of the application referred to in them, and that it is more than probable that that application was collusively made with the object of providing evidence to defeat the rights of the plaintiffs which had accrued four years previously, that is to say, in 1871. The defendants tendered in evidence before us a document alleged to be a copy of an award made on the 10th July, 1863. We rejected this evidence on the ground that it was not proved to our satisfaction that any such award was made, and that the absence of the original, if made, was not satisfactorily accounted for. The story as to the loss of the original document and that of the other instrument referred to in the Subordinate Judge's judgment, and the finding of the pieces, appeared to us to be too suspicious to be acted upon by us. No arbitration agreement was produced, although Sarfaraz Husain, a witness for the defendants, had stated that it remained with the Kázi. Besides, no such agreement to refer or award is alluded to in the deed of agreement, dated the 1st November, 1878, executed by the defendants Syed Mansab Ali, Yad Ali and Karam Ali, by which disputes as to property, including the property in question, were referred to arbitration. The evidence of the defendant's witnesses as to what was the subject and scope of the alleged arbitration and the nature of the alleged award we have rejected on the ground that the alleged agreement to refer and the alleged award have not been produced, and the absence of

those documents has not been satisfactorily accounted for. As to the defence of payment, we agree entirely with the finding of the Subordinate Judge and his reasons. Further, if the evidence as to the payment is to be credited, the defendant Mansab Ali within two years after the execution of the bond made payments which were more than sufficient to discharge the principal and interest then due. No receipt has been produced, and although the bond provides that all payments on account should be endorsed upon it, and that no unendorsed credits should be claimed by Syed Mansab Ali, no payments have been endorsed on the instrument. If the payments had been made, it is inexplicable that the mortgagor would have allowed the mortgagees to retain possession of the bond from 1870 to the present day. As to the paper No. 43, the Court below properly rejected it as evidence, as we also have done.

Finding as we do, for the reasons which we have already stated, that the property hypothecated by the deed of the 5th January, 1868, was the separate property of Syed Mansab Ali, and that the principal and interest made payable by that deed are still due and unpaid, it remains to be considered to what extent the claim of the plaintiffs is to be decreed.

It is clear that the plaintiffs are entitled to the principal, together with interest at the agreed rate of Rs. 2-2 per mensem for three years and six months from the date of the execution of the bond, the 5th January, 1868, up to the 30th of June, 1871. It is not disputed that this at least is the legal construction of the bond and the result of our findings on the facts. The plaintiffs, however, claim to be entitled in addition to interest from and subsequent to the 30th June, 1871. They contend that by the bond itself such additional interest is expressly made payable, or that we should infer from the wording of the bond that it was the intention of the parties that interest should be payable until the principal should have been repaid, or that the plaintiffs are entitled to damages for the non-payment on the 30th June, 1871, of the principal and interest then due, and that such damages may be awarded for the period of six years immediately prior to the commencement of this action. This latter contention was based on the further contention that the non-payment of the principal and interest on the agreed date constituted a continuing breach, giving a continually renewed cause of

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action from day to day from that date up to the commencement of the action. As we read the authorities, interest as interest cannot be allowed on money lent in India on a hypothecation bond, or on a deed of conditional sale, unless it appears from the bond or deed that it was the intention of the parties that interest should be payable, and then only for the period during which it so appears that it was intended that interest should be payable. The principal authorities on this point are collected in the notes at pages 113 and 114 of Macpherson's Law of Mortgage in British India, 7th ed. In the case of *Cook* v. *Fowler* (1) it was decided in the House of Lords, (so far as the law in England is concerned) that in a contract for the payment of money borrowed for a fixed period on a day certain, with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest after that day until actual payment is not "to be implied, unless there is something to justify it upon the words of the particular instrument; and that although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract." See Lord Selborne's judgment in that case.

The mortgage-deed in question, so far as it bears upon this question, is as translated in the following words:—"I therefore declare and write that I shall without any objection discharge and pay in full the principal with interest at the rate of Rs. 2-2-0 per cent. per mensem within three years and six months from the date of the execution of this bond up to the 30th June, 1871. All the payments made by me, the executant, to the said mortgagees at each harvest and in each year shall first be applied to the payment of interest, and the balance, if any, shall be carried towards the satisfaction of the principal. I shall cause the payments I make to be endorsed on this document, and if I, the declarant, claim any payment not entered on the back of this document, such claim shall be false and untenable. If the mortgage-money together with interest be not paid in full within the stipulated time, then under this document the mortgage on the property hypothecated by me shall be foreclosed, and the mortgagees shall be at liberty to take proprietary possession of my the executant's share." There is

(1) L. R. 7 H. L. 27.

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here obviously no express agreement to pay interest *post diem*, and we are of opinion that no such agreement can be implied from this deed. As we read the deed, the expressed intention of the parties was that if on the 30th of June, 1871, the principal and interest then due were not paid, the mortgagees should be entitled to foreclose for the principal and interest due and unpaid on the 30th of June, 1871, and not for any interest *post diem*. In our opinion, the wording of the deed negatives any such implication as that contended for on behalf of the plaintiffs. Whether or not the plaintiffs are entitled to have damages awarded to them for the non-payment of the principal and interest on the 30th June, 1871, must depend on whether or not s. 23 of the Indian Limitation Act, 1877, applies to this case. The damages are claimed in respect of the breach of a contract in writing registered within the meaning of art. 116 of the second schedule of the Indian Limitation Act, 1877, and, unless s. 23 applies, the period of limitation is six years from the date of the breach (see arts. 116 and 115 of the second schedule to the Indian Limitation Act, 1877). It cannot be said that there were here successive breaches within the meaning of art. 115. The contract was to pay the amount due on the 30th June, 1871, if not previously paid, and on the failure to pay on the day appointed the breach of the contract was committed. There are many contracts of which there may be successive breaches, as for instance contracts by which a party to the contract agrees to do or to forbear doing two or more different things: in such contracts the contracting party may commit several breaches by not doing those things which he has contracted to do, or by doing those things which he has contracted not to do. The contract under consideration was to do one thing; that was to pay the amount due on or before the 30th June, 1871, and on the non-payment of the money on the day appointed the breach of the contract was committed. It cannot, in our opinion, be said that there was here a continuing breach. A covenant for title is an instance of a contract of which, according to the English law, there may be continuing breaches. So is a covenant to maintain a building in repair. There is a breach of the covenant for title so long as an adverse title exists, and there is a breach of a covenant to maintain a building in repair so long as the building is out of repair. To take another

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example from the English law, the period of limitation *primâ facie* begins to run on a promissory note payable on demand from the date of the note, the debt being payable without any demand, and the non-payment of the note is not, according to English law, a continuing breach which extends the period of limitation. The Indian Limitation Act specifically provides for the period of limitation for bringing an action on a promissory note payable on demand, but this fact does not make the illustration from the English law the less apposite. We are clearly of opinion that the breach of agreement here took place on the 30th of June, 1871, and that there was no continuing breach within the meaning of s. 23 of the Indian Limitation Act, 1877. Taking this view of the law, we must hold that the claim of the plaintiffs to compensation for breach of the agreement is barred by art. 116 of the second schedule of the Indian Limitation Act, 1877, and must be disallowed. The result is that a decree as against the defendant Syed Mansab Ali will be drawn up in accordance with s. 86 of the Transfer of Property Act, 1882, but limiting the amount to be paid to be Rs. 2,300 principal money and interest thereon at the agreed rate of Rs. 2-2-0 per mensem for three years and one-half, that is, from the 5th January, 1868, up to the 30th of June, 1871, with proportionate costs and interest at the rate of Rs. 12 per centum per annum during the pendency of the suit, and at the rate of Rs. 6 per centum from the date of the decree until payment or the expiration of six months from the date of the decree, whichever shall first happen, and to this extent the appeal of the defendant Syed Mansab Ali is allowed with proportionate costs to him to be allowed in account.

Appeal allowed in part.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

1887
November 10.

THE UNCOVENANTED SERVICE BANK, LIMITED (PLAINTIFF) *v.* GRANT (DEFENDANT).*

Limitation—Acknowledgment in writing—Act XV of 1877 *(Limitation Act), s.* 19, *explanation I.*

In a suit upon a bond brought against the defendant as a principal debtor, an acknowledgment of liability as a surety only is sufficient to save limitation, with reference to s. 19, explanation I, of the Limitation Act (XV of 1877.)

THIS was a suit brought by the Uncovenanted Service Bank, Limited, against C. W. Stapleton, Mrs. M. S. Stapleton, and Lieutenant-Colonel C. W. Grant, for recovery of Rs. 1,088-9-0 principal and interest due upon a bond dated the 17th April, 1879. As regards the two first-named defendants the suit was not pressed, the plaintiff Bank having been unable to ascertain their place of residence and to serve summonses upon them. The plea of the defendant Colonel Grant was that he had "executed the bond as a surety only," to which extent he admitted the claim, and he prayed "that in passing the decree in this suit the Court will be pleased to make a provision that execution shall be taken only against the principal debtors first, and in case of their failure to satisfy it the decree may be executed against him."

The suit was instituted on the 9th June, 1885. The third paragraph of the plaint was as follows:—"That the claim of the plaintiff is within limitation, inasmuch as the defendants subsequently, and before the expiry of the period of limitation, acknowledged the said debt by their acknowledgments hereto attached."

So far as regards the defendant Colonel Grant the acknowledgments here referred to were contained in three letters written by him to the Manager of the Bank, and dated respectively the 13th July, 1881, the 6th June, 1882, and the 22nd February, 1883. The first of these letters was as follows:—"Your letter of the 19th instant just come to hand. I was under the impression that the amount of Rs. 1,000 for which I went in security for Mr. Stapleton had been paid up long ago. Of course I do not dispute my liability for the balance remaining, Rs. 698-8-0, but as I have not received any notice of Mr. Stapleton having been a defaulter, I

* Second Appeal No. 1434 of 1886 from a decree of A. Macmillan, Esq., District Judge of Agra, dated the 15th May, 1886, confirming a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Agra, dated the 9th November, 1885.

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must ask you to give me a few days' grace to enable me to write to him, to find out whether he wishes to let me in for the whole sum, or whether he has any sort of plan to suggest." The letter of the 6th June, 1882, contained expressions to the effect that the writer did not "deny his liability," but thought "that Mr. Stapleton and other sureties should pay up something." The letter of the 22nd February, 1883 contained these expressions:—"You appear to have twisted the meaning of my letter. I wish to see Mr. Stapleton, whether he is going to meet his engagement like an honest man or is going to let me in. I have no intention of withdrawing from the position I have taken up, as I wish Mr. Stapleton's conduct in the matter to be known to the public."

The Court of first instance (Subordinate Judge of Agra) was of opinion, upon the construction of the bond in suit, that Colonel Grant was liable as a surety only; and that the action of the plaintiff Bank in not pressing the suit against the principal debtors was equivalent to a release or discharge of those debtors, which, under s. 134 of the Contract Act, operated as a discharge of the surety. The Court accordingly dismissed the suit.

On appeal by the plaintiff Bank, the District Judge of Agra gave judgment as follows:—

"This is a suit on a bond dated the 17th April, 1879. Colonel Grant, respondent, says he was a surety only. According to the terms of the bond he was a principal. Admitting that he could properly be permitted to adduce evidence in contradiction of the bond to show he was not a principal but a surety, there is no evidence which shows that there was any arrangement made between him and the appellant, in whose favour the bond was executed, to the effect that he, respondent, was to be treated only as a surety. There may have been an understanding between the respondent and Mr. Stapleton, who was a co-executant of the bond, that the latter was to be primarily responsible as principal; but if such an arrangement was made, it is not shown that the appellant consented to it.

"A point has, however, been raised on behalf of the respondent which appears to me to be fatal to the appellant. This suit was brought after the ordinary period of limitation had expired.

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Limitation has been saved by written acknowledgments given by the respondent. They are contained in his letters to the appellant dated the 13th July, 1881, the 6th June, 1882, and the 22nd February, 1883. In these letters he acknowledged liability only as a surety. His pleader argues that the appellant, who relies on the letters to save limitation, is bound by the restriction implied by their terms, and that he cannot succeed against the respondent as a principal when he only acknowledged liability as a surety.

"Having referred to such authorities as are at hand, I find that, according to the rulings of English Courts of law, the plea urged by the respondent's pleader is valid. There is in particular a case in which it was ruled that a promise by a debtor in respect of a debt for which he was jointly liable with others to pay his proportion of the debt renewed his liability only to the extent of his proportion: *Leckmere* v. *Fletcher* (1); and there is another case in which a promise by a surety to make up what the principal debtor should fail to pay was held to renew the debt for the deficiency only, after application to the debtor: *Humphreys* v. *Jones* (2).

"The rulings referred to were given on the principle that where an action is brought after ordinary limitation has run, and the creditor is obliged to rely on a renewed promise, he can enforce the promise only to the extent to which the debtor has limited it, and a conditional acknowledgment operates only subject to the condition. I am not aware of any rulings by High Courts in India laying down a different principle. I therefore hold that in this suit the appellant can only deal with the respondent as a surety.

"It follows that the appellant cannot succeed in his appeal: for having sued the respondent along with two other defendants as principals, he got the lower Court to pass an order exempting the other two from being parties. That is to say, he withdrew from his suit against the other two. He did not ask the Court for permission to withdraw with liberty to bring a fresh suit, nor did the Court's order permit withdrawal with liberty to bring a fresh suit. The withdrawal without permission to bring a fresh suit involved the discharge of the other two executants of the bond alleged by the appellant to be principals. Their discharge discharges the respondent, according to the principle of s. 134 of Act IX of

(1) 1 C. & M. 623. (2) 14 M. & W. 1.

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1872. I consider, therefore, that the appellant is not entitled to a decree against the respondent, and I dismiss this appeal with costs."

The plaintiff Bank appealed to the High Court from the District Judge's decree.

Maulvi *Abdul Majid* and Munshi *Hanuman Prasad*, for the appellant.

Mr. *G. T. Spankie* and Lala *Durga Charan*, for the respondent.

STRAIGHT, J.—It is sufficient for the purpose of determining the questions raised in this appeal to say that the learned Judge in the Court below has held that the defendant-respondent was a principal debtor under the bond of the 17th April, 1879, and in that capacity liable to the present suit. The contention on behalf of the plaintiff Bank is that the Judge, having formed this opinion as to the character filled by him in respect of that instrument, has erroneously held that the three letters of the 13th July, 1881, 6th June, 1882, and the 22nd February, 1883, did not constitute an acknowledgment so as to save time running against the plaintiff Bank. I am of opinion that the contention for the plaintiff-appellant is a good one, and that these three letters and each of them does constitute such an acknowledgment as is contemplated by s. 19 of the Limitation law, more particularly having reference to the language of the explanation I of that section. Incidentally I may observe that the language of explanation I is exceedingly wide, and that it covers cases which would not be covered by the ordinary rules applicable in the English Courts to acknowledgments which have been set up by the parties for the purpose of saving limitation. I think that those letters were acknowledgments of the right of the plaintiff Bank to the amount of the bond-debt due to them, and that the mere circumstance that the defendant therein mentioned that his liability was of a conditional character only did not make them any the less acknowledgments. They were, in my opinion, sufficient to save time to the plaintiffs and make their present suit unobjectionable upon the score of limitation. This being so, the appeal is decreed, the judgment of the Judge reversed, and the case will be restored to his file of pending appeals and disposed of upon the merits. Costs hitherto incurred will be costs in the cause.

BRODHURST, J.—I concur.

Cause remanded.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

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November 11.

GOODALL (JUDGMENT-DEBTOR) *v.* THE MUSSOORIE BANK, LIMITED, AND ANOTHER (DECREE-HOLDERS) *

Assignment of interest pending suit—Assignment after decree in Court of first instance —Assignee made a party after appellate decree for purposes of execution—Civil Procedure Code, ss. 372, 647.

S. 372 of the Civil Procedure Code cannot be applied to the assignment, creation, or devolution of an interest subsequent to the decree in a suit. The section has no application to proceedings in execution of decree; and a Court has no jurisdiction, reading s. 372 with s. 647, to bring in a party after decree and make him a judgment-debtor for the purposes of execution. *Gocool Chander Goswamee* v. *The Administrator-General of Bengal* (1) and *Attorney-General* v. *Corporation of Birmingham* (2) referred to.

Where a Court had so acted, by an order which might have been, but was not, made the subject of appeal under s. 588 (21) of the Code, *held* that as there was no jurisdiction to make such an order, the party aggrieved was competent to object thereto on appeal from a subsequent order enforcing execution against him as a judgment-debtor.

THE facts of this case were as follows:—In March, 1876, a suit was brought by the Mussoorie Bank, Limited, in the Court of Small Causes at Dehra Dún, against A. C. Raynor and Caroline Raynor, the executors of Mrs. M. A. Raynor, to recover a sum of money due to the Bank by the deceased. On the 18th April, 1876, the suit was decreed on confession of judgment. On the 25th May, 1876, upon application by the decree-holders, the Court attached thirty shares in the Delhi and London Bank standing in Mrs. Raynor's name, by an order under s. 236 of Act VIII of 1859, the Civil Procedure Code then in force. An objection to this attachment was filed by the defendant A. C. Raynor under s. 246 of the same Act, paying for the release of twenty-four of the shares upon the allegation that he was entitled to them in his own right under the will of Captain Raynor, the husband of the deceased Mrs. Raynor; that Mrs. Raynor had, under that will, a life-interest only in her husband's property with a power of appointment among her children; and that the shares were therefore not liable to attachment and sale in satisfaction of her debt. This objection was disallowed; and in March, 1877, a regular suit was brought

* First Appeal No. 78 of 1887 from a decree of G. Galbraith, Esq., Subordinate Judge of Dehra Dún, dated the 28th February, 1887.

(1) I. L. R., 5 Calc. 720; 5 Calc. L. R., 108. (2) L. R., 15 Ch. D. 423.

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by A. C. Raynor in the Court of the Subordinate Judge of Dehra Dún, in which he claimed a declaration of his right to and possession of the twenty-four shares and to have the summary order dismissing his objection set aside. On the 10th May, 1878, the suit was dismissed, the Subordinate Judge being of opinion that Mrs. Raynor took an absolute interest under Captain Raynor's will, and that consequently the twenty-four shares, as forming part of her estate, were attachable in execution of the Mussoorie Bank's decree for her debt. On the 22nd August, 1878, the High Court, on appeal by A. C. Raynor, reversed the Subordinate Judge's decree, holding that, under Captain Raynor's will, Mrs. Raynor held the estate not absolutely, but for life, as trustee for her children, with a power of appointment among them (1). The costs due to Raynor under this decree were Rs. 1,177-14-9.

At various dates from the 8th May to the 9th December, 1878, applications were made, on behalf of the Bank, for the arrest of Raynor in execution of a decree against him passed by the High Court on the 2nd January, 1878, under which Rs. 2,959-8 were due from him to the Bank. In pursuance of orders passed on these applications Raynor was several times arrested, but on making various payments in part satisfaction, was released. On the 12th December, 1878, Raynor having applied for execution of the High Court's decree of the 22nd August, the Subordinate Judge passed an order attaching the certificates of the twenty-four shares in the possession of the Manager of the Mussoorie Bank. On the 13th January, 1879, the High Court refused leave to the Bank to appeal from the decree of the 22nd August to Her Majesty in Council. On the 10th February, the Manager, in pursuance of an order of the Subordinate Judge, produced the certificates in Court. They were handed over on the same date to Mr. H. B. Goodall, Barrister-at-Law, who had acted throughout as counsel for Raynor. This was done in pursuance of a written agreement entered into between Raynor and Goodall on the 17th January, whereby Raynor agreed to transfer to Goodall all his rights and interests in the twenty-four shares, in consideration of Goodall's paying off the Mussoorie Bank's decree of the 2nd January, 1878, and paying to Raynor Rs. 1,000 in cash. Upon the certificates being handed to Goodall

(1) *Raynor* v. *The Mussoorie Bank*, I. L. R. 2 All. 55.

on the 10th February as already mentioned, Raynor executed in his favour a deed whereby he formally transferred the shares in pursuance of the agreement. On the 26th February, upon the application of Raynor, the Court of Small Causes released the shares from the attachment placed on them by its order of the 25th May, 1876.

On the 14th August, 1879, the Privy Council gave the Mussoorie Bank special leave to appeal to Her Majesty in Council from the High Court's decree of the 22nd August, 1878. Judgment was given in the appeal on the 21st March, 1882, the effect of the decree being to set aside the decision of the High Court and to dismiss the regular suit instituted by Raynor in the Subordinate Judge's Court in March, 1877 (1). The Mussoorie Bank thereupon, on the 22nd June, 1882, applied to the Court of Small Causes to proceed with the execution of the decree of the 18th April, 1876, but apparently took no further steps in that Court, which, on the 9th March, 1885, passed an order striking off the case. Meanwhile, on the 24th July, 1882, the Bank presented an application to the Subordinate Judge in Raynor's regular suit for execution of the decree of Her Majesty in Council, by restoring the certificates of the twenty-four shares which had been given up on the 10th February, 1879, under the High Court's decree of the 22nd August, 1878. On the 12th December, 1882, Raynor, who had been ordered "to produce the shares in Court," filed a petition in which he set forth the transfer of the shares to Goodall on the 10th February, 1879, and stated that, in consequence of Goodall being in England, he could not at that time produce the shares, and prayed for an adjournment of six months to enable him to sue Goodall for their recovery. This application was rejected, and Raynor was arrested in execution of the Privy Council's decree; but the Bank failed to obtain satisfaction, and on the 3rd March, 1884, applied to the Subordinate Judge to make Goodall a party to the execution proceedings. On the 1st April, 1884, the Subordinate Judge issued a notice to Goodall, who was then in England, in the following terms:—

"In pursuance of an order passed this day in the above suit, you are hereby required to appear in this Court, either in person or by

(1) *The Mussoorie Bank, Limited*, v. *Raynor*, I. L. R. 4 All. 500.

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a duly authorized pleader, on or before the 15th July, 1884, and show cause why you should not be called upon to restore the twenty-four Delhi and London Bank, Limited, shares, numbered 7371 to 7394, made over to you by the plaintiff."

Notwithstanding this notice, Goodall, at some time in June or July, 1884, transferred the twenty-four shares through a broker. On the 25th November, 1884, an order was passed by the Subordinate Judge on the Bank's application of the 3rd March previous, directing that Goodall's name should be placed on the record, so that the Privy Council's decree might be executed against him. An application by Goodall to the High Court for revision of this order under s. 622 of the Civil Procedure Code was rejected on the 9th May, 1885, on the ground that the order was passed under s. 372 of the Code and was appealable under s. 588 (21) (1).

On the 7th December, 1885, Goodall having, by the preceding orders, been made a party to the execution proceedings, the Bank applied for execution of the decree against him by attachment and sale of his house at Mussoorie, "if he fails to restore the twenty-four Delhi and London Bank shares and their dividends taken by him which are the subject of this suit." On the 28th January, 1886, an order was passed by the Subordinate Judge, purporting to be made under s. 259 of the Civil Procedure Code, and directing that the house should be sold, unless within six months the shares should be handed over. Upon the same date the house was attached by an order under s. 274 of the Code. On the 3rd May, 1886, a petition was presented by Goodall, in which he objected to the attachment and prayed for its removal; and at length, after repeated adjournments, the Subordinate Judge, on the 28th February, 1887, gave judgment dismissing the petition and ordering the sale

(1) *Raynor* v. *The Mussoorie Bank, Limited*, I. L. R. 7 All. 681, where the Subordinate Judge's order of the 25th November, 1884, is set forth. The report of that case contains mistakes which may conveniently be corrected here. The title of the case should be *Goodall* v. *The Mussoorie Bank, Limited*, Raynor not having been a party. Both in the judgment and in the statement of facts it is made to appear that the Subordinate Judge's order under revision was passed on Raynor's application of the 12th December, 1882; and the judgment proceeds to a considerable extent upon the supposition that the case was "a controversy between two judgment-debtors *inter se*," and that the decree-holder was not a party to it. In point of fact the order was, as above stated, passed on the application of the decree-holder, the Mussoorie Bank, of the 3rd March, 1884, against Goodall only; and Raynor's application of the 12th December, 1882, was rejected, and not granted, by an order dated the 14th of the same month.

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to proceed, if the shares were not made over by Goodall within a further period of six months.

The Court's order was in the following terms:—"He is ordered to produce the shares called for, Nos. 7371 to 7394, Delhi and London Bank, within six months from this date. Should Mr. Goodall prefer it, he is hereby allowed to hand over to the Court, or to the Mussoorie Bank, Delhi and London Bank shares of a value equivalent to the twenty-four shares in question as given above, or again Mr. Goodall is permitted to pay in a sum of money into Court, or to the Mussoorie Bank, equivalent to the value of the twenty-four shares at the prevailing market rate. In addition, Mr. Goodall must pay all the interest which has fallen due on the twenty-four shares from the date on which he got possession up to such date on which he obeys the above order in any one of the ways specified. An enquiry will have to be made in order to ascertain what amount of interest be due, and, if necessary, a commission will issue for that purpose. In case Mr. Goodall fails to obey the Court's orders within the specified period of six months the property, under s. 259 of the Code, will, on the application of the Mussoorie Bank, decree-holder, be sold and the proceeds dealt with as provided for by that section. Mr. Goodall must also pay all costs of these proceedings."

From this order Goodall appealed to the High Court. The sixth of the grounds taken in the memorandum of appeal was "that the Subordinate Judge was wrong in holding that the appellant purchased the shares *pendente lite*, and in making appellant a party to the execution proceedings under s. 372 of the Civil Procedure Code."

Mr. *A. Strachey*, for the appellant.

[STRAIGHT, J.—Confine yourself to your sixth ground of appeal. I do not see what jurisdiction the Subordinate Judge had to make the order of the 25th November, 1884, making the appellant a party to the suit after decree.]

There was no jurisdiction to make such an order: *Attorney-General* v. *Corporation of Birmingham* (1), *Gocool Chunder Gossamee* v. *The Administrator-General of Bengal* (2), per Pontifex, J.

(1) I. L. R., 15 Ch. D. 423.
(2) I. L. R., 5 Calc. 726; 5 Calc. L. R. 108.

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See Order XVII, Rules 1 and 3 under the Judicature Act, Rules of 1883. The appellant did not purchase "pending the suit."

The other side will rely on s. 647 of the Code, but that section does not mean that the procedure in suits before decree is to be applied indiscriminately after decree. It was intended to provide a procedure for miscellaneous matters, such as probate, similar to that of suits: *Amir Hasan* v. *Ahmad Ali* (1), *Naiyappa* v. *Gangawa* (2), *in the matter of the petition of Jodoo Monee Dossee* (3). The only way in which s. 647 could have been applied was to make the appellant a party while the appeal was pending before Her Majesty in Council by application to the Judicial Committee, or, if the appellant had purchased during the proceedings in execution of the Privy Council decree, those proceedings might have been treated as analogous to a suit. Further, the proper person, if any, to be made a party under s. 372 was not Goodall, but his transferee. At the time when the order of the 25th November, 1884, was passed, the appellant had parted with all his interest in the shares. [He was stopped.]

Mr. *J. E. Howard*, for the respondent (the Mussoorie Bank). This plea is too late. The order of the 25th November, 1884, as pointed out by Tyrrell, J., might have been appealed under s. 588 (21) of the Code. No appeal having been preferred, the order has become final and cannot now be questioned.

Mr. *A. Strachey*, for the appellant, in reply. The order of the 25th November, 1884, was of an interlocutory character, and the order now under appeal is in the nature of a final decree—s. 2 of the Code—in appeal from which all interlocutory orders, appealable or otherwise, may be objected to: Civil Procedure Code, s. 591, *Har Narain Singh* v. *Kharag Singh* (4), *Googlee Sahoo* v. *Premlall Sahoo* (5). The objection goes to the jurisdiction of the Subordinate Judge to make the order now under appeal, and it may be made at any time.

STRAIGHT, J.—This is an appeal from an order passed by the Subordinate Judge of Dehra Dún on the 28th February, 1887. That order professes to be passed in execution of a Privy Council

(1) I. L. R., 9 All. 36.
(2) I. L. R., 10 Mom. 433.
(3) 11 W. R. 404
(4) I. L. R., 9 All. at p. 451.
(5) I. L. R. 7 Calc. 148.

decree dated the 21st March, 1882, and I may, for the purpose of making it quite intelligible why I have adopted the view of this case that I have, state a few dates and facts. Some time prior to August, 1878, a gentleman of the name of Raynor brought a suit against the Mussoorie Bank in respect of an attachment that had been made of twenty-four shares in the London and Delhi Bank. That suit was instituted in the Court of the Subordinate Judge of Dehra Dún, and it was ultimately dismissed by that Court. Then an appeal was preferred to this Court, and Sir Robert Stuart, Chief Justice, and Pearson, J., who heard that appeal, reversed the decision of the Subordinate Judge, and decreed the plaintiff's suit on the 22nd August, 1878.

The Bank then applied to the two learned Judges of this Court who had heard the appeal for leave to appeal from their decree to their Lordships of the Privy Council, and on the 13th January, 1879 that application was refused. The Bench incidentally observed, I suppose for the purpose of affording information to the parties, that it was open to them to go direct to their Lordships of the Privy Council and obtain special leave. That course was adopted by the Mussoorie Bank, and on the 14th August, 1879, they obtained such leave from their Lordships of the Privy Council, and their appeal was admitted. Between the date when this Court refused leave and the date when special leave was granted by the Privy Council, twelve out of the twenty-four shares in the London and Delhi Bank which were the subject-matter of the action were transferred by Raynor to Mr. Goodall, the appellant before us. Whether that was a transfer *pendente lite* is a matter about which I am not called upon to express any opinion, and I express none, though upon further consideration since yesterday, and in order to correct any erroneous impression that may have been gathered from some remarks made by me, I am by no means clear that the doctrine of *lis pendens* will apply to the circumstances of this case. The Privy Council order decreeing the appeal and dismissing the suit was made on the 21st March, 1882, and in the ordinary course it was forwarded to this Court for transmission to the Court of the Subordinate Judge of Dehra Dún for execution. On the 24th July, 1882 an application for execution was made, and among the matters asked by the decree-holder was that the Court would cause

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the shares unduly realized by Raynor in execution of the High Court's decree to be restored. Upon that application an order was made by the Subordinate Judge directing Raynor to produce the shares, and he failing to do so, an order was made for his arrest, and, as I understand it, he was arrested. From that time until the month of March, 1884, no further steps seem to have been actively taken for the purpose of executing the decree; but on the 3rd March, 1884 the Bank filed a petition in the Court of the Subordinate Judge, praying that Goodall, the appellant before us, might be brought on as the representative of Raynor. On the 1st April, 1884, the Court issued a notice to Goodall, the terms of which are most significant, and they in substance were as follows, namely, that Goodall was to show cause why he should not be called upon to restore the shares. Now that was the notice to Goodall, and was the only intimation he ever received from the Court of the Subordinate Judge as to what was required from him, and yet upon a notice of that kind, and in reference to a certain affidavit which Goodall sent from England to the Court of the Subordinate Judge, that Court, on the 25th November, 1884, made Goodall a party to the decree in the character of a judgment-debtor. Having put him on the record in that character and after certain proceedings had been held, the Subordinate Judge subsequently passed the order of which complaint is now made on the 28th February, 1887, by which, treating Goodall as a judgment-debtor and as a person amenable to the execution of the decree, he directed him either to hand over the shares or to pay their equivalent, and went on to order that, in default of doing so, under the provisions of s. 259, certain property belonging to him would be sold to satisfy the decree.

At the commencement of the argument yesterday, which was so concisely put before us by Mr. *Strachey* for the appellant, I suggested to him the propriety of confining himself to the single question of the jurisdiction of the Subordinate Judge to pass such an order by reason of his want of jurisdiction to have passed the order of the 25th November, 1884, making Goodall a party to the decree. That is the only question that has been discussed, that is the only question which I propose to decide, and, as I am in favour of the

appellant upon that point, his appeal will succeed and the order of the Judge will be set aside.

Before, however, closing the remarks I have to make in regard to this case, I desire to point out why it is that I think the order of the Judge is without jurisdiction. Mr. *Howard* for the respondent yesterday suggested that as the order of the 25th November, 1884, had not been appealed as it might have been, it had, by reason of the absence of any such appeal, become final, and it was not open to Mr. *Strachey* in the present proceeding to question the jurisdiction of the Subordinate Judge to make either that order or any other order passed in regard to Goodall, who by that order had been joined as a judgment-debtor.

I dissent from that contention of Mr. *Howard*, and I have no hesitation in holding that in an appeal of the kind before me, where the objection goes to the very root of the matter and to the authority of the Court to make the order in the sense that it had no jurisdiction at all, I am entitled to entertain it, and if it has force, to give effect to it. In my opinion the Subordinate Judge had no power under the law to bring in a party after the decree and make him a judgment-debtor for the purpose of applying the provisions applicable to the execution of the decree. It is said that taking s. 647 of the Code and reading it in conjunction with s. 372, it is competent for a Court executing a decree to do on the execution side what a Court on the original side may do under the latter section; that is to say, it may, after decree, bring in any person who by assignment, creation, or devolution of any interest pending the suit, has become interested in the subject-matter thereof. It is noticeable that s. 647 is specific in its terms. It says that the procedure herein prescribed shall be followed "as far as it can be made applicable" in all proceedings in any Court of civil jurisdiction other than suits and appeal. But it is impossible to my mind to make s. 372 applicable to execution proceedings, because by its own language it negatives any such applicability to execution proceedings. The words used there are "assignment, &c., *pending the suit*." What the meaning of the words "pending the suit" is to my mind perfectly clear, namely, during the progress of the suit and before the passing of the decree, and in that interpretation I am

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borne out by the observations of Pontifex, J., in *Gocool Chander Gossamee* v. *The Administrator-General of Bengal* (1). Moreover, in reference to a somewhat analogous rule under the Judicature Act I find a decision of Jessel, M. R., concurred in by James and Brett, L. JJ., in *Attorney-General* v. *Corporation of Birmingham* (2), where Jessel, M. R., remarks :—"A statement of claim or bill cannot be amended after final judgment. If it becomes necessary to enforce that judgment against persons who have acquired a title after it was made, an action must be brought for that purpose."

Here it is to be observed that in the wording of s. 372 the language is almost identical with the rule cited by Jessel, M. R., and it shows what is to be done in reference to the continuing of a suit, *i. e.*, a *trial* of a case when the subject-matter with which the suit is concerned has passed away to another person. It is not pretended here that Goodall acquired any interest prior to the date of the decree; on the contrary, it was subsequent to the decree that he acquired such interest [see *Raynor* v. *The Mussoorie Bank* (3)]. That being so, I am of opinion that ss. 372 and 647 had no application to the case; that Goodall was improperly made a judgment-debtor, and so improperly being made a judgment-debtor, the provisions of s. 259, which are sought to be enforced against him, are in no way applicable. The result is that the appeal is decreed with costs, *quoad* the Mussoorie Bank, and the order of the Subordinate Judge set aside. As to the respondent Raynor it is by consent dismissed with costs (4).

BRODHURST, J.—I concur.

Appeal allowed.

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(1) I. L. R., 5 Calc. 726.
(2) I. L. R., 15 Ch. D. 423.
(3) I. L. R., 7 All. 681.
(4) Raynor had been cited as a respondent through some mistake. He was represented by Mr. *G. E. A. Ross*.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

1887
November 12.

BALWANT SINGH (PLAINTIFF) *v.* SUBHAN ALI AND ANOTHER (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—"Pattidars"—"Chakdars."

Held that the terms of a *wajib ul-arz* conferring a right of pre-emption upon "*pattidars*" did not apply to a *chakdar* holding a share in the same *chak* as the vendor.

THIS was a suit for pre-emption based on the *wajib-ul-arz* of a village, which gave a right of pre-emption to "*pattidars*" in cases of transfer. The clause of the *wajib-ul-arz* relating to pre-emption was as follows:—"If any *pattidar* wishes to sell or mortgage a part or whole of his property, at first he will have to offer it to his brother or brother's son or a member of the same family on a proper consideration. In case of their refusal he will transfer to the other co-sharers, and they will have to pay the same price as offered by the stranger; and in case of the latter's refusal he will have power to mortgage or sell it to any one he likes."

The facts of the case are set out in the following judgment of the lower appellate Court (District Judge of Allahabad) dismissing the suit:—

"This is a claim of pre-emptive right. The plaintiff-appellant and the vendor are '*chakdars*' holding shares in the same *chak*. The question at issue is whether the right of pre-emption under the *wajib-ul-arz* extends to *chakdars* or not.

"I have no hesitation in deciding that it does not.

"The terms of the pre-emption clause clearly restrict its operation to 'pattidars,' and it is well understood that the object of the provision is in all cases to exclude strangers, and a *chakdar* would not ordinarily be one of the co-parcenary community, nor is it asserted that the appellant is so.

"It is, however, ingeniously contended that a *chakdar*, inasmuch as he is a proprietor paying revenue, is as much a sharer in the mahál as a pattidar, and that the circumstance of his owning a certain area of land instead of a fractional share does not affect his status as a sharer in the mahál.

* Second Appeal No. 1390 of 1886 from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 4th June, 1886, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 11th December, 1885.

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"A ruling, *Niamat Ali* v. *Asmat Bibi* (1), has been referred to, to show that the expression '*hakiyat*' has been held to mean any land held under a proprietary title, such as a grove, &c., and not merely a fractional share; and it is argued that a '*chak*' thus comes within its scope, and *therefore* within the pre-emption clause, ~~in which~~ the word '*hakiyat*' is used.

"The fallacy of this argument is patent. The '*chakdar*' is a proprietor *in* the *mahál* no doubt, but he is not a pattidar or co-sharer of the mahál. The word '*hakiyat*' may no doubt include a '*chak*,' but that is not the point, which is, whether a '*chakdar*' can claim the right to pre-emption, and not whether, if an acknowledged pattidar should sell a '*chak*,' a right of pre-emption could be raised by another pattidar, to which latter case the ruling might apply. To the present case it does not.

"The fact that the *chakdars* are entered in the *khewat* and *wajib-ul-arz* does not advantage the appellant as it is contended on his behalf that it does. In the *khewat* they are necessarily entered, as they pay a quota of the Government demand and own proprietary rights, but they are even in that distinguished and separated from the pattidars.

"In the *wajib-ul-arz* they are similarly dealt with in the category of inferior proprietors.

"The difference between a '*pattidar*' and a '*chakdar*' is apparent in the fact that the former is jointly responsible with his follow-pattidars for the payment of the Government demand assessed on the mahál, and in the undivided part of a mahál has rights in each biswa, but no separate rights in any particular biswa, whereas the latter is responsible for his own quota of the revenue only, and owns a certain area which is all his own, while he has no right outside it.

"Neither party has produced any evidence to prove whether the *chakdars* were admitted to enjoyment for payment of the Government demand, but there can be no doubt that they were not.

"Failing the contention that a '*chakdar*' is as much a sharer in the mahal as a 'pattidar,' and therefore has a good claim to

(1) I. L. R. 7 All. 620.

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the right of pre-emption, it is argued that '*chakdars*' have at least the same right among themselves within the limits of their '*chak*' that the pattidars have in the whole mahál. This again is an ingenious but untenable proposition.

"The pre-emptive clause applies to pattidars only; there is no provision for its extension to *chakdars* even within the limits of their *chak*. This appears to me to be too obvious to require further remark.

"The appeal is dismissed with costs."

The plaintiff appealed to the High Court, on the ground that the terms of the *wajib-ul-ars* were applicable to *chakdars*.

Munshi *Ram Prasad*, for the appellant.

Mr. *Amiruddin* and Maulvi *Abdul Majid*, for the respondents.

EDGE, C. J.—The judgment of Mr. Elliot is a very clear judgment. I approve of that judgment. I think Mr. Elliot's conclusions are correct. The appeal is dismissed with costs.

STRAIGHT, J.—I concur.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

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November 2*h*.

AHMAD ALI KHAN (PLAINTIFF) *v.* HUSAIN ALI KHAN (DEFENDANT). *

Act XV of 1877 (*Limitation Act*), *sch. ii, Nos.* 60, 127—"*Joint family property*"—"*Exclusion*" *from such property.*

A Muhammadan family consisting of three brothers and their uncle jointly owned certain immoveable property which the uncle managed. Two of the brothers effected a settlement of accounts with the uncle, with reference to the profits of the estate; the share of the three brothers was appropriated; and the money representing that share was deposited with the uncle. Subsequently the two who had effected the settlement withdrew their portion of the common share, and the third brother sued the uncle to recover a sum of money as his one-third portion. He alleged that he had been deceived by the defendant into supposing that his portion was included in the amount withdrawn by his brothers; but he did not base his suit upon any allegation of fraud. It was contended that art. 127, sch. ii, of the Limitation Act (XV of 1877) applied to the suit, limitation running from a date whereon the defendant had denied all liability in respect of the plaintiff's demand.

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* First Appeal No. 216 of 1885 from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saháranpur, dated the 17th August, 1885.

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Held that the amount claimed could not, under the circumstances, be regarded as joint family property, that the defendant's denial of the plaintiff's right to recover that amount was not an exclusion of the plaintiff from such property, and that consequently, art. 127 did not apply to the suit.

THE facts of this case were as follows :—The plaintiff Ahmad Ali Khan, his two brothers Asghar Ali Khan and Khurshaid Ali Khan, and his uncle the defendant Husain Ali Khan, held certain immoveable property jointly. This property was managed by the defendant. An agreement for partition of the estate having, in 1873, fallen through, on the 21st May, 1875, a settlement of accounts was effected between the plaintiff's two brothers and the defendant, with reference to the profits of the preceding thirteen years. Whether or not the plaintiff was an active party to that settlement was a matter of dispute. Upon the settlement of accounts, the plaintiff received Rs. 5,419 in cash, and a large sum of money (of disputed amount) was deposited by his brothers with the defendant. On the same date as the settlement of accounts and receipt of the Rs. 5,419, namely, the 21st May, 1875, the plaintiff joined with his brothers in executing in favour of the defendant a deed of acquittance, whereby they acknowledged having received all the money which was due to them by him for their share of the profits of the family property.

In 1876 the plaintiff brought a suit against his brothers Asghar Ali Khan and Khurshaid Ali Khan, in which the defendant Husain Ali Khan was subsequently added as a defendant by order of the Court. In that suit the plaintiff alleged that the money which on the taking of accounts in 1875 was ascertained to be the share of the three brothers was a sum of Rs. 88,531 ; that this amount less the Rs. 5,419 which he acknowledged having received had been deposited with Husain Ali Khan by his brothers ; that they had dishonestly removed it from Husain Ali Khan's custody and deposited it elsewhere in their own separate account, and that out of it he was entitled to recover Rs. 24,091, being the balance of Rs. 29,570, which he alleged to be his one-third share of the Rs. 88,531. The defendant Husain Ali Khan pleaded in a written statement, dated the 18th August, 1877, that the accounts of thirteen years had been taken with the plaintiff's knowledge, that a deed of acquittance had been given by him, and that Rs. 83,111

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odd which remained after payment to the plaintiff of Rs. 5,419 had been deposited with him by the plaintiff's two brothers, and had been withdrawn by one of them in June, 1875, and nothing remained in his hands on deposit. On appeal the High Court decided that the plaintiff was not entitled to share in the amount deposited with the defendant and afterwards withdrawn by Asghar Ali Khan and Khurshaid Ali Khan, and accordingly dismissed the suit.

On the 15th May, 1884, the plaintiff brought the present suit against Husain Ali Khan. In his plaint he alleged that his brothers and the defendant, on the 21st May, 1875, had adjusted the account of the joint estate and found that Rs. 1,12,200 were due to the plaintiff and his brothers from the defendant in respect of the profits of the estate. He alleged also that a deed of acquittance was drawn out, which he, not being acquainted with the real facts, signed at the request of his brothers and the defendant. In para. 6 of the plaint he said:—"After the adjustment of account, the aforesaid amount was placed in deposit with the defendant; and two-thirds of it, namely Rs. 74,800, were realized by the plaintiff's brothers as their share from the defendant, and by deducting Rs. 5,419, the balance is due to the plaintiff." He proceeded to allege that a misunderstanding took place between the defendant and his brothers, and the defendant, seeing them ready to file a suit, gained over the plaintiff, who, according to his own account, was "a simpleton" and an inexperienced person, and that the defendant, by making use of the plaintiff's signature to some blank papers, caused a groundless suit in the name of the plaintiff to be brought against the plaintiff's brothers to the effect that they had his share in the money which they had realized, and that it should be paid to him by them. He further alleged that after that suit was determined the defendant put off from time to time paying the money to him, and at last he took measures to obtain his rights; and he stated in para. 11 that his cause of action arose on the 25th October, 1883. He alleged in para. 12 that he was deceived by the defendant, but he did not base his action on any allegation of fraud. In para. 13 he stated:—"As the plaintiff has no proper means for enquiring into the facts prior to the amicable settlement of 1875 and he finds it useless to repu-

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diate the adjustment of account and the matters irrelevant thereto, he is compelled to confine himself to one out of several reliefs, and he prays to obtain a decree for Rs. 31,981, being his share in the remaining amount held in deposit, with costs and future interest against the defendant. Suit valued at Rs. 31,981. All the papers relating to the case will be filed at the first hearing of the case."

In reply the defendant raised a number of pleas which it is unnecessary for the purposes of this report to mention. Para. 3 of the written statement was as follows:—"The allegation that at the adjustment of accounts the profits of the joint estate amounting to Rs. 1,12,000 were found due to the plaintiff and his brothers, and that they were deposited with the defendant, is quite false and contrary to the plaintiff's own repeated declarations. After the adjustment and settlement of the accounts, Rs. 88,531-11-9 only were found due to the plaintiff and his brothers, and with the exception of Rs. 5,419, which the plaintiff's brothers themselves got to be paid to the plaintiff, the whole of the balance of Rs. 83,111-11-9 which was deposited with the defendant by the plaintiff's brothers was paid to them by him, as has been invariably admitted by the plaintiff." Para. 5 was as follows:—"The suit is fit to be dismissed for this reason also, that the defendant had, on the 18th August, 1877, in distinct words totally denied his responsibility to the plaintiff, and computing the period of limitation from the said date, this suit is certainly beyond time; because, whatever may be the nature of the plaintiff's demand, the cause of action in respect thereof had accrued on that date."

The Court of first instance held that the plaintiff's cause of action accrued on the 18th August, 1877, the date of the defendant's written statement in the former suit, and that the suit was barred by limitation. The Court at the same time considered the case upon the merits, and coming to the conclusion that the plaintiff had not proved the allegations contained in his plaint dismissed the suit.

The plaintiff appealed to the High Court. In reference to the question of limitation, it was contended that either art. 60 or art. 127 of the Limitation Act (XV of 1877) was applicable, and that upon either supposition the suit was within time. In regard to art.

60, it was argued that the deposit was admitted by the defendant in para. 3 of his written statement, and that there was no evidence of any demand prior to the 25th October, 1883, the date mentioned in para. 11 of the plaint. In regard to art. 127, it was argued that the amount claimed was "joint family property," that the plaintiff not having been a party to the settlement of accounts of the 21st May, 1875, nothing had been done which, so far as he was concerned, deprived the property of its joint family character or altered the nature of his title to it, and that his "exclusion" from his share, within the meaning of art. 127, accrued on the 18th August, 1877, when the defendant first denied all liability in respect of the share.

Mr. *C. H. Hill*, Mr. *A. Strachey*, and Pandit *Sundar Lal*, for the appellant.

The Hon. *T. Conlan*, Maulvi *Abdul Majid*, Munshi *Hanuman Prasad*, and Pandit *Moti Lal Nehru*, for the respondent.

EDGE, C. J. (after stating the facts, and holding that the conclusions of the Court of first instance upon the merits were substantially correct, continued):—The question of limitation has been argued in two ways before us. It has been argued that art. 60 of the 2nd schedule of the Limitation Act applies to this case on the basis that it has been proved that there was a deposit within the meaning of that article, and that we must infer an agreement to pay on demand, and that there was proof that the first demand was made on the 25th October, 1883. I see no evidence of deposit within the meaning of that article or at all, so far as the plaintiff is concerned. As I have said, it is very probable that these parties intended to defraud, and did probably in that transaction of May, 1875, defraud, the plaintiff. But that is not his case now. The plaintiff relies of course on para. 3 of the defendant's written statement, but that paragraph would not assist the plaintiff, even if it were not absolutely at variance with the finding of this Court in the previous action. That paragraph makes no admission that any money was deposited by the plaintiff or by the plaintiff's brothers on the plaintiff's behalf with the defendant.

The other question which has been argued with regard to limitation is based on art. 127 of the 2nd sch. of the Limitation

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Act. It is contended that art. 127 applies to this case, and that the plaintiff in the present action is a person excluded from joint family property who is suing now to enforce a right to share therein. There are two or three answers to that contention. In the first place, according to the plaintiff's own case, the account was settled, the share of the three brothers was appropriated, and the money representing that share was deposited with the defendant, and the plaintiff's two brothers subsequently drew out their portion of the common share of the three. That is the plaintiff's case. How the balance now claimed could be said, under those circumstances, to be joint family property, I fail to see. If the plaintiff's case was a true one, according to his plaint that balance would represent the moneys which had come to him out of the joint family property; but having once so come to him and having been separately appropriated and enjoyed by him, I fail to see anything of joint family property in it. It was the result of his having enjoyed the family property, and the fact of his having received it and then deposited it in the hands of the manager of the joint property would cause it to cease to retain the status of a joint family property, just as much as if it had been deposited in the hands of a third person not connected with the estate. I may say that I do not think that art. 127 applies at all to a cause like this. There has never been, so far as we know, a denial of the plaintiff's right to share in the family property. What has been denied is the plaintiff's right to recover the specific money. I cannot see how it can be said that he was excluded. If he has been excluded from the proceeds of his share, he was excluded either by fraud on the part of the defendant and his brothers, which is not the case which he attempts to make out here, or he was excluded in this sense, that he did not exercise his right of asking for the money from his agent. In any way looking at this case as launched before this Court on behalf of the plaintiff, we fail to see from the plaintiff's own case how art. 127 can possibly apply.

Under these circumstances, I come to the conclusion that the judgment and the decree of the Court below was a proper one and that this appeal ought to be dismissed with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

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CRIMINAL REVISIONAL.

1887 November 25.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS v. SHEODIN AND ANOTHER.

Act X of 1872 (*Criminal Procedure Code*), *s.* 518—*Duration of Magistrate's order—Criminal Procedure Code, s.* 144—*Act XLV of* 1860 (*Penal Code*), *s.* 188.

In 1876 a Magistrate passed an order under s. 518 of Act X of 1872 (Criminal Procedure Code), directing the Saraogis of Etah to take one of their annual religious processions along a particular route and at a particular hour. In 1886, in which year there was no fresh promulgation of the order, the Saraogis took their procession along another route and at a different hour, and for so doing some of them were convicted and sentenced under s. 188 of the Penal Code.

Held that the conviction was wrong, the order of 1876 having a temporary operation only. *Gopi Mohun Mullick* v. *Turamoni Chowdhrani* (1) referred to.

The facts of this case are sufficiently stated in the judgment of Mahmood, J.

Mr. *J. Simeon*, for the petitioners.

Babu *Jogindro Nath Chaudhri* and Babu *Ratan Chand*, for the respondents.

MAHMOOD, J.—This case has come up before me at the instance of the petitioners for interference in revision under s. 439 of the Code of Criminal Procedure. The facts out of which the dispute has arisen may briefly be stated to be the following:—

In the town of Etah the Hindu population seems to be divided into two sections holding religious views antagonistic to each other. One of these sections, and probably, as I am informed, forming the majority of the population, are Vaishnavites, that is, the worshippers of Vishnu, who is one of the gods of the Hindu Trinity. The other sect, who are stated to be the minority of the population, are Saraogis or Jains, who repudiate entirely the sanctity of the Hindu Trinity of the Godhead and the authority of the minor gods and goddesses, and who also repudiate the sanctity of the Vedas, the Puranas, and other holy scriptures of the Hindu religion. Indeed they are a section of the Buddhists holding doctrines which also prevail in other parts of India. These conflicting doctrines have before now produced disturbances of the peace in connection with religious processions. It is stated by Mr. *Simeon* on behalf of the petitioners, and I myself am aware of the fact as a matter of the religious history of this part of the country (of which fact I can

(1) I. L. R., 5 Calc. 7.

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take judicial notice under the latter part of s. 57 of the Evidence Act (I of 1872), that the Hindus belonging to the Vaishnav creed look with horror upon the appearance of the idol of Parasnath, whom the Saraogis worship, and indeed regard it as a sin to look at the idol. It was no doubt in consequence of this circumstance that, on the 2nd September, 1876, the Magistrate, acting under the authority which s. 518 of the Criminal Procedure Code (Act X of 1872) conferred upon him, promulgated an order whereby it was determined that the Saraogis were to take the procession of *Rath-Jatra*, or *Parasnath-ka-Mela*, as the ritual is called there, by a particular route and at a particular time. The object of making the night as the time when the *Rath*, or chariot, was to proceed was to obviate as much as possible the Vaishnav section of the Hindu community from looking upon the image.

It appears that for some years after the 2nd September, 1876, the route and the time of the procession of this annual ceremony were duly observed, and that no occasion arose for any dispute between the two sections of the community, and it was not till 1886 that any quarrel arose in respect of the matter.

It appears that in September, 1886, when the Saraogis contemplated the performance of the ceremony of *Rath-Jatra*, or religious procession of the chariot of Parasnath, which in many respects and incidents is analogous to the procession of the chariot of Jagarnath—a Vishnava Hindu deity—they applied to the Magistrate for certain police arrangements, no doubt expecting possible disturbances by the Vaishnav section of the community. Thereupon the Magistrate, by an order of the 13th September, 1886, which may perhaps be taken to have been passed under s. 144 of the Criminal Procedure Code (Act X of 1882), issued no specific directions to the petitioners Saraogis, but directed the District Superintendent of Police to make the usual arrangements. The procession took place on the 14th September, 1886, in the forenoon of the day, and it proceeded by a route and at a time not prescribed by the Magistrate's order of the 2nd September, 1876, which pointed out night to be the time when the *Rath* was to be paraded.

Upon this state of things a complaint was made by Mr. *Simeon's* clients, the Vaishnav Hindus, charging Mr. *Chaudhri's* clients, the

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Saraogis, with having committed the offence mentioned in s. 188 of the Indian Penal Code, and it resulted in a conviction of the accused and sentence of fine by the Magistrate, who held that the action of the Saraogis amounted to a disobedience of the Magistrate's order of the 2nd September, 1876. The Saraogis, who are represented before me by Mr. *Chaudhri*, appealed from such conviction to the learned Sessions Judge, who, by his order of the 2nd July, 1887, directed a further enquiry as to whether or not the original order of the 2nd September, 1876, was repromulgated in 1886. It was found by the Magistrate upon evidence, and in that conclusion the learned Sessions Judge agreed, that the order of 1876 was not repromulgated in 1886. The learned Judge, therefore, held that at the time when the procession of the *Rath-Jatra* took place on the 14th September, 1886, the Saraogis in varying the time and the route of the procession were not disobeying any subsisting order of the Magistrate, and that, therefore, they were not guilty of offence under s. 188 of the Indian Penal Code.

I am entirely of the same opinion. It seems to me that in interpreting statutes of a penal character it is important to see that the powers conferred upon the Magistrates are duly exercised with reference to the rendering unlawful of acts that would otherwise be lawful. Under the old Code, Act X of 1872, s. 518 gave to Magistrates the power to issue orders in cases of obstruction, danger to human life, or riots, and the explanation to the section clearly shows that the Legislature in conferring this power intended it only to be applied to emergent matters. That section, however, did not prescribe any limitation or duration as to the duration of the order remaining in force; but a Full Bench of the Calcutta High Court in *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* (1) concurred in holding upon general principles of the interpretation of such statutes that the Magistrate was not empowered to pass an order under s. 518 of Act X of 1872 which would have more than a temporary operation, and that the grant of what is in effect an order for a perpetual injunction was beyond such magisterial jurisdiction. I follow the principles of that ruling, and I cannot help thinking that s. 144 of the present Code, in modifying the

(1) I. L. R., 5 Calc. 7.

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law contained in the corresponding section 518 of the old Code, takes into account what Garth, C. J., said in the Full Bench case to which I have referred, and I say this because I find that whilst s. 518 of the old Code was silent as to the duration of a Magistrate's order passed for the purposes mentioned, the present Code in the last paragraph of s. 144 contains express provisions, saying that "no order under this section shall remain in force for more than two months from the making thereof, unless in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the local Government, by notification in the official Gazette, otherwise directs." This, then, is the present law, and I think also was virtually the older law, though, of course, no duration was named in the older Code.

Applying these views to this case, it is clear that the order of the 2nd September, 1876, was not promulgated again in 1886 by the Magistrate, and that no conviction could take place because of any disobedience of the order of September, 1876, an order which cannot be held as having subsisted ten years. Mr. *Simeon* on behalf of the petitioners has indeed contended that the language of the order of the 13th September, 1886, was to incorporate all the terms, conditions and particular directions of the order of the 2nd September, 1876. I have heard the original order of September, 1886, and cannot accept this contention. The words of the order contain no specific directions either as to the time of the procession or the route through which it was to pass, and I cannot take the expression "as usual" to imply that the order of the 2nd September, 1876 was incorporated there in its entirety. And because the order of the 13th September, 1886, was silent as to this matter, no offence was committed by the Saraogis in carrying the procession by a route and at a time other than that prescribed by the Magistrate's order of 1876 as they did on the 14th September, 1886.

I hold, therefore, that the learned Sessions Judge has rightly acquitted the Saraogis, and that no interference in revision is required by this Court. The application is dismissed.

Application rejected.

CIVIL REVISIONAL.

1887
November 26.

Before Mr. Justice Mahmood.

SHEO PRASAD SINGH (PETITIONER) *v.* KASTURA KUAR (DECREE-HOLDER).*

Jurisdiction, presumption of—Maxim, Omnia præsumuntur rite et solemniter esse acta—*Civil Procedure Code, ss.* 103, 283, 647—*High Court's power of revision—Civil Procedure Code, s.* 622.

The consideration of an objection under s. 278 of the Civil Procedure Code, having first been entertained and adjourned by an Additional Subordinate Judge, subsequently came before the Subordinate Judge, who struck off the case for default. No order under s. 25 transferring the case to the Subordinate Judge was on the record, nor was it otherwise shown how he obtained jurisdiction to deal with it.

Held that the High Court, in the exercise of its revisional powers under s. 622 of the Code, should not presume that the Subordinate Judge had taken up the case without jurisdiction; that the proper remedy of the petitioner was an application under s. 103, read with s. 647, or a suit under s. 283; and that the High Court should not interfere in revision.

The facts of this case are sufficiently stated in the judgment of Mahmood, J.

Pandit *Sundar Lal*, for the petitioner.

Mr. *G. T. Spankie*, for the respondent.

MAHMOOD, J.—This is an application presented to this Court invoking its interference, as a Court of revision, by exercise of the authority conferred upon it by s. 622 of the Civil Procedure Code. The facts from which this application has arisen may briefly be recapitulated to be the following:—

One Musammat Kastura Kuar obtained a money decree against one Musammat Jelaba Kuar on the 16th July, 1884, and in execution of the decree the property to which this litigation relates was attached on the 30th November, 1886, as the property of the judgment-debtor. These proceedings of attachment admittedly took place in the Court of the Additional Subordinate Judge of Gházipur, and it was in that Court that the present petitioner, Babu Sheo Prasad, filed an application on the 30th March, 1887, objecting to the attachment mainly upon the ground that the judgment-debtor was not the owner of the property attached. Indeed, Pandit *Sundar Lal*, on behalf of the petitioner, concedes that the application was of the character contemplated by s. 278 of the Code of Civil Procedure.

* Miscellaneous application No. 187 of 1887.

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It appears, then, that Rai Cheda Lal was the Additional Subordinate Judge of Gházipur, and we find that, on the 10th May, 1887, he adjourned the hearing of the application. Another adjournment was made by his order of the 4th June, 1887, and then the case appears to have come on for hearing, not before the Additional Subordinate Judge, Rai Cheda Lal, but before Pandit Kashi Narain, who is the Subordinate Judge of the District, and by his order of the 14th June, 1887, the hearing of the application was once more adjourned. The order says that the pleaders for the parties having departed, the case was to come on for hearing the next day, *i.e.*, the 15th June, 1887. What happened then is best represented by the order of the learned Subordinate Judge himself, and it runs as follows:—

"The case came on to-day again, and the pleaders have departed. Ordered that the case should be struck off for default." This order dated the 15th June, is the one of which revision is prayed for in this application.

The application originally came on before the learned Chief Justice, who, by his order of the 9th August, 1887, directed notice to be issued to the opposite party to "show cause why the order of Pandit Kash. Narain, dated the 15th June, 1887, should not be set aside on the ground that it was made without jurisdiction, and why the case should not be restored to the list of the additional Subordinate Judge for disposal."

In obedience to this order Mr. *Spankie* has appeared to show cause on behalf of the opposite party, and the learned counsel has, among other things, relied upon a preliminary contention which aims at showing that in the due exercise of its revisional powers this Court should not interfere. In the first place, the learned counsel contends that the rule contained in the maxim *Omnia praesumuntur rite et solemniter esse acta* applied to this case, and that, until the contrary is shown, the order by the learned Subordinate Judge, Pandit Kashi Narain, of the 15th June, 1887, should be deemed to be an order passed with jurisdiction and in the manner the law contemplates.

To this argument the reply which Pandit *Sundar Lal*, on behalf of the petitioner, could make was that the only manner in which

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the case could be within the jurisdiction of the Subordinate Judge was that a Court of appeal exercising its functions had transferred it under s. 25 of the Civil Procedure Code, and that the mere circumstance of the absence of such order from the record of the present case removed the presumption, and, indeed, proved, as the learned pleader contends, that the Subordinate Judge, Pandit Kashi Narain, had no jurisdiction to dispose of the case. The learned pleader has also argued that even if it be taken for granted that the learned Subordinate Judge and the Additional Subordinate Judge had concurrent jurisdiction over the matter, the circumstance that Rai Cheda Lal, the Additional Subordinate Judge, was seized of the case, would render the concurrent jurisdiction of the learned Subordinate Judge, Pandit Kashi Narain, ineffective in taking over a case and making orders thereon, of which case the Additional Subordinate Judge was already seized. In supporting this argument the learned pleader has used the analogy of the concurrent jurisdictions of the various Judges of this Court, and he has contended that as one Judge seized of a case cannot thereafter be deprived of it by another Judge, so even if the Additional Subordinate Judge and the Subordinate Judge did possess concurrent jurisdiction, one could not be deprived of his legal powers to adjudicate upon a case he was seized of.

So far as the latter part of this contention is concerned, I do not think it necessary to determine the point because, although the argument has been very ably put before me by Pandit *Sundar Lal*, I cannot help feeling that the answer Mr. *Spankie* relies upon renders its decision unnecessary in this case. Mr *Spankie's* contention is that the want of jurisdiction upon which the whole argument proceeds must not be presumed. I think this is a sound argument, because it seems to me that the want of jurisdiction may arise owing to numerous classes of facts which are to be determined by the lower Courts and not by Courts of revision. There may be want of jurisdiction owing to territorial limits of jurisdiction, owing to the nature of the class of litigation, owing, perhaps, to an order such as s. 25 of the Civil Procedure Code contemplates, owing, perhaps, to the appointment of the Judge not being duly and lawfully made, owing to the cause of action having accrued at a place other than that where the litigation commenced,

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and owing to other numerous matters, such as the defendant's living in a foreign jurisdiction. In regard to the manner in which I understand the word "jurisdiction," I need only say that I have already given expression to my views in *Dhan Singh* v. *Basant Singh* (1) and that I still adhere to those views.

But the question is whether I, sitting here as a Court of revision, should enter into the various hypotheses and possibilities which may result in one answer or other as to the question of jurisdiction. Mr. *Spankie* contends that this Court should not exercise, under the circumstances, the discretionary powers it possesses under s. 622 of the Civil Procedure Code. Apart from the questions of fact which may have a bearing upon the question of jurisdiction, the learned counsel contends that the ordinary remedies which were open to the present petitioner have not been adopted by him, and that, therefore, this Court should not interfere in revision. The learned counsel contends with great force that the order of the 15th June, 1887, now sought to be revised was such as could have been passed under s. 102, read with s. 647, of the Civil Procedure Code, and that, indeed, the usual remedy open was to apply under s. 103 of the Civil Procedure Code for the restoration of the case and due adjudication thereupon. Further, the learned counsel argues that another remedy was open to the petitioner before asking this Court to revise the order complained of, and that remedy was a regular suit such as s. 283 of the Civil Procedure Code contemplates.

I am of opinion that this contention has force. The principles upon which the visitatorial functions of the Courts of revision, such as in this case, should be exercised were fully considered by Mr. Justice West in the case of *Shiva Nathaji* v. *Joma Kashinath* (2), in which, at the end of the judgment, certain conclusions are specifically enumerated. I have always entertained the greatest respect for the rulings of that eminent Judge, and I have more than once stated that this particular judgment was one deserving of the highest respect from the Indian Courts, and I adopted it in *Sundar Das* v. *Mansa Ram* (3), in which my brother Brodhurst concurred. The general effect of these rulings, as far as this case is concerned,

(1) I. L. R., 8 All. 519. (2) I. L. R., 7 Bom. 341.
(3) I. L. R., 7 All. 407.

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is to lay down general principles that the especial and extraordinary remedy by invoking the revisional powers of this Court should not be exercised unless as a last resource for an aggrieved litigant. In this case the ordinary remedies have not been adopted by the petitioner, and I do not think it is necessary for me, as a Court of revision, to go into the detail whether or not such facts exist as to justify the conclusion that the lower Court did not exercise jurisdiction.

Pandit *Sundar Lal* in an elaborate and able argument has, indeed, contended, as a matter directed to induce me to exercise the revisional powers of this Court, that the simplest course would be for me not only to decide matters of fact which would suggest one decision or other as to jurisdiction, but also to decide, even if there was jurisdiction, whether or not sufficient reasons existed for striking off the case in default. All I need say to this argument is that I do not think that the Legislature intended this Court, as a Court of revision, to exercise any such functions. I, therefore, decline to interfere in revision and dismiss the application with costs.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

CHAJJU (DEFENDANT) *v.* SHEO SAHAI (PLAINTIFF).*

1887
November 29.

Pre-emption—Rival suits—Each pre-emptor made defendant in the other's suit—Suits tried together, but decided by separate decrees—Decree allowing pre-emption in one case only on condition of default by other pre-emptor—Finality of decree in superior pre-emptor's suit.—Appeal by inferior pre-emptor in his own suit—Appellate Court not competent to alter decree so as to affect superior pre-emptor's right.

In two rival suits for pre-emption each pre-emptor was made a defendant in the other's suit. The suits were tried together upon the same evidence and were disposed of by a single judgment, but by separate decrees. In one of the suits the pre-emptor obtained a decree in the terms of s. 214 of the Civil Procedure Code. In the other, the pre-emptor obtained a decree, subject to the condition that, in the event of the first pre-emptor failing to execute his decree, the second pre-emptor should be entitled to execute it. The decree in the first suit was not appealed, and became final. The second pre-emptor appealed from the decree in his own suit, upon the grounds that the amount ordered to be paid was excessive, and that the first pre-emptor had lost his right, and the decree in the second suit should not have been made subject to the condition above stated.

* Second Appeal No. 1427 of 1886 from a decree of H. G. Pearse, Esq., District Judge of Meerut, dated the 14th May, 1886, reversing a decree of Babu Brijpal Das, Subordinate Judge of Meerut, dated the 1st March, 1886.

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Held that the appellant, if he desired to get rid of the decision regarding the first pre-emptor's preferential right, should have appealed against the first pre-emptor's decree, but that that decree having become final, the questions between the two pre-emptors could not be re-opened on appeal from the second pre-emptor's decree.

This was a reference to a Division Bench by Mahmood, J., under the proviso to Rule I of the Rules of 11th June, 1887. The order of reference, in which the facts are fully stated, was as follows :—

MAHMOOD, J.—This is a case in which the question raised seems to be one of sufficient importance to be referred to a Division Bench.

The facts are that three persons, Sikandar, Aladad, and Durjan, executed a sale of their 10 biswansis share in favour of two persons, Sheo Sahai and Harjas, on the 6th June, 1884, for a sum represented in the sale-deed as Rs. 4,000. Thereupon Chajju, the present defendant, appellant, instituted a suit to enforce his right of pre-emption on the 3rd June, 1885, and to this suit he impleaded the vendors and the vendees, and subsequently the name of Sheo Sahai, plaintiff, respondent, was also added. This suit was numbered 130 in the register of the first Court.

Similarly Sheo Sahai, plaintiff, respondent, instituted another suit to enforce his right of pre-emption in respect of the same sale, dated the 6th June, 1884, and to that suit he impleaded the vendors and the vendees and the rival pre-emptor, Chajju, plaintiff in the suit No. 130. This suit was instituted two days after the earlier suit, i.e., on the 5th June, 1885, and was numbered 131 in the register of suits.

Both these suits appear to have been tried together and upon the same evidence, and resulted in two decrees of even date, namely, the 1st March, 1886. In the judgment of the first Court it was held that Chajju, plaintiff in the suit No. 130, had a right of pre-emption superior to that of Sheo Sahai, plaintiff in suit No. 131. Therefore the first Court passed a decree enforcing the right of Chajju to the property in suit upon payment of Rs. 4,000 as the consideration money in suit No. 130. In the other suit, No. 131, in which Sheo Sahai was the plaintiff, the first Court decreed his claim, but rendered the decree subject to the condition that, in the

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event of the plaintiff Chajju in the other case failing to execute his decree, Sheo Sahai was entitled to execute it. Chajju, plaintiff in suit No. 130, did not appeal, nor did Sheo Sahai or any other defendant to that action appeal against the decree in that suit. But Sheo Sahai, plaintiff in the suit No. 131, being dissatisfied with the decree passed in his favour, appealed to the lower appellate Court principally upon the ground that the amount of consideration was excessive, and that the pre-emptor Chajju, plaintiff in the other suit, had lost the right of pre-emption, and, as such, did not stand as an impediment to the exercise of his right of pre-emption.

Upon this appeal from the decree in suit No. 131 the learned Judge modified the decree of the first Court by reducing the purchase money to Rs. 701, and holding that Chajju had no right of pre-emption, because he was in collusion with the vendees of the sale of the 6th June, 1884.

In second appeal it is contended by Mr. *Sundar Lal* that the judgment and the decree of the lower appellate Court is erroneous, because the decree before him was the decree in suit No. 131, and the decree in the suit No. 130, not having been appealed against, became final, and as such binding upon the parties, the rival pre-emptors, namely, Chajju and Sheo Sahai, and that the lower appellate Court in adjudicating upon the decree in suit No. 131 practically set aside the finality of the decree in suit No. 130. Mr. *Chaudhri* on the other side contends that the effect of the decree of the lower appellate Court must be held to be limited to modifying the decree in suit No. 131, and the fact that the effect of it may be inconsistent with the decree in suit No. 130 does not vitiate the validity of the lower appellate Court's decree in this case.

In the case of *Kashi Nath* v. *Mukta Prasad* (1) I have expressed my view as to the array of parties in cases where in respect of one and the same sale rival suits to enforce the right of pre-emption are instituted. But the question raised in this case is one not covered by that ruling, and it is one which I consider sufficiently important to refer to a Division Bench. I therefore, under the proviso to Rule I of 11th June, 1877, refer the case accordingly.

Pandit *Sundar Lal*, for the appellant.

(1) I. L. R., 6 All. 370.

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Babu *Jogindro Nath Chaudhri*, for the respondent.

STRAIGHT and BRODHURST, JJ.—The facts of this case are very fully and clearly stated in the referring order of our brother Mahmood. The only argument addressed to us was based upon the sixth plea taken in the memorandum of appeal, namely, that the decree passed in favour of the defendant-appellant in suit No. 130 having become final by reason of no appeal being preferred from it, the matters in issue between him and the plaintiff No. 131, respondent before us and defendant in suit 130, had been heard and finally determined, and could not be again tried and determined in the appeal from the decree passed in suit 131. We are upon consideration constrained to hold that this contention is a sound one and must prevail. It is true that the first Court tried the two suits 130 and 131 together and disposed of them by a single judgment; but separate decrees were prepared, each of which was appealable by the party or parties aggrieved thereby, and, failing such appeal, finally settled the question between the plaintiff on the one side and the defendant on the other. In suit 130 as between the plaintiff Chajju and the defendant Sheo Sahai, the decree determined the issues as to the former's preferential right over the latter, and the amount to be paid, and directed the period within which it was to be paid, in accordance with the provisions of s. 214 of the Civil Procedure Code. This decree still stands, and the Rs. 4,000 having been paid in by Chajju, the decree-holder, within the specified time, he has now become entitled to possession of the property. It was from this decree that Sheo Shai, the respondent before us, should have appealed, if he desired to get rid of the decision in regard to the plaintiff Chajju's right to pre-empt, and not having done so, it was not competent for the Judge in the appeal from the decree in suit 131 to re-open the questions between those two persons.

In so far, therefore, as his decision dwelt with those matters and his decree affects Chajju, this appeal must be and it is decreed with costs, and the respondent's appeal to the lower appellate Court *quoad* Chajju dismissed with costs.

Appeal allowed.

Before Mr. Justice Mahmood.

1887
December 3.

PRAN KUAR (JUDGMENT-DEBTOR) *v.* DURGA PRASAD (DECREE-HOLDER).*

Execution of decree—Decree for enforcement of hypothecation—Decree limiting judgment-debtor's liability to the hypothecated property.

A decree upon a hypothecation bond which only provides for its enforcement against the hypothecated property cannot be executed against the person or other property of the judgment-debtor, though an order for costs contained therein may be so executed.

The facts of this case are sufficiently stated in the judgment of the Court.

Babu *Ratan Chand*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

MAHMOOD, J.—The facts of the case, as they have been put before me by the learned pleaders of the parties, are the following:—

The present appellant, Musammat Pran Kuar, judgment-debtor, executed a hypothecation bond in favour of Sahu Durga Prasad, the decree-holder-respondent before me, who, having sued upon the bond, obtained a decree on the 7th July, 1881. It is also admitted that the decree was put into execution, and the property hypothecated in the bond, the lien created whereby was given effect to by the decree, has already been brought to sale in execution of the decree.

The present litigation has arisen out of an application made by the decree-holder for the execution of the above-mentioned decree, not against the hypothecated property, but against the other property of the judgment-debtor, the appellant before me, and personally against her. To this application objections were taken by the appellant, in which the main contention urged by her was that neither was she personally liable nor her property other than that hypothecated could be sold in execution. This contention was accepted by the Court of first instance, which disallowed the application, but upon appeal to the lower appellate Court, the learned Judge of that Court reversed the first Court's order in a judgment which runs

* Second Appeal No. 1785 of 1886 from a decree of C. W. P. Watts, Esq., District Judge of Moradabad, dated the 6th August, 1886, reversing a decree of Babu Gopal Datta, Munsif of Bilari, dated the 16th January, 1886.

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as follows :—"The prayer for relief distinctly asks that if the hypothecated property be not sufficient, decree may be satisfied from the other property of the debtor. Now decree was given according to the claim. One would suppose that the Munsif had never seen the file. I accept the appeal and cancel the order of the Munsif with costs. Decree can be executed against the other property of the judgment-debtor, but as to her person I say nothing."

From this order this second appeal has been preferred, and Mr. *Ratan Chand* for the appellant contends that the only point on which he relies in support of the appeal is that the terms of the decree of the 7th July, 1881, cannot bear the interpretation which the learned Judge of the lower appellate Court has put upon it. The original decree is framed in the Hindustani language and I have carefully read its terms. The effect, as I understand, of the original Hindustani may be represented in English in the following terms :—"It is ordered and decreed that Rs. 946-5-0, the money claimed, and Rs. 97-14-6 costs, making a total of Rs. 1,044-3-6, together with future interest at annas eight per cent. per mensem, be decreed *ex parte* against the defendant. If the defendant within a period of six months pays up the amount decreed, then the decree will become inoperative ; otherwise it will be executed, and the hypothecated property having been brought to sale, the decretal amount will be paid from the proceeds thereof ; and it is also ordered that the defendant pay to the plaintiff the sum of Rs. 99-14-6 in respect of costs of this Court to which she has been rendered liable.

Mr. *Ratan Chand* argues that these terms of the decree are limited to the liability of the hypothecated property and do not render the judgment-debtor liable personally to any execution that can be taken out under the decree. I am of opinion that this contention is sound, but only to a partial extent. In the case of *Raghubar Dayal* v. *Ilahi Bakhsh* (1) Mr. Justice Oldfield and myself had to consider a similar question of the interpretation of a decree, and in that case both of us concurred in holding that a decree that was worded similarly to this so far as the present point is concerned,

(1) I. L. R., 7 All. 450.

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was limited to the liability of the hypothecated property, though it decreed a personal obligation, so far as order as to costs was concerned. This is a case in which a similar question arises, and I still adhere to the views expressed in that case. These views are in accord with those expressed by Mr. Justice West in the recent case of *Sheik Budan* v. *Ramchandra Bhunjgaya* (1), and I am not prepared to alter the views which were adopted in the former ruling.

Mr. *Kashi Prasad* in resisting the appeal argues that the first part of the decree declares the liability for the whole amount to be borne by the hypothecated property, and also personally by the judgment-debtor. For this contention he relies upon a Full Bench ruling of this Court in the case of *Debi Charan* v. *Pirbhudin Ram* (2). In regard to that ruling, all I need say for the purposes of this case is that the decree considered there was differently framed, and the ruling is inapplicable to the present case.

The interpretation of the decree, as I understand it, is that it limits the liability for the principal sum of the money claimed to the hypothecated property, but that the order as to costs is an order which could be executed to the extent of such costs against the judgment-debtor. I therefore decree the appeal, and, setting aside the order of the lower appellate Court, direct that the execution of the decree against the judgment-debtor-appellant personally be limited to the order as to costs which the decree contains; but as this view of the case was not taken by the Courts below, the proper course for me is to remand the case to the Court of first instance under s. 562 of the Civil Procedure Code for being dealt with according to law with reference to the observations I have made.

Costs will abide the result.

Cause remanded.

(1) I. L. R., 11 Bom. 537. (2) I. L. R., 3 All, 338.

1887
July 14.

Before Mr. Justice Mahmood.

MADHO LAL AND ANOTHER (DECREE-HOLDERS) *v.* KATWARI (JUDGMENT-DEBTOR)*

Execution of decree—Decree for enforcement of hypothecation—Objection by judgment-debtor that property ordered to be sold is not legally transferable under N.-W. P. Rent Act, s. 9—Such objection not entertainable in execution.

In execution of a decree for enforcement of hypothecation by sale of specific property, an objection by the judgment-debtor that the property is not transferable, with reference to s. 9 of the N.-W. P. Rent Act, cannot be entertained.

The facts of this case are sufficiently stated in the judgment of the Court.

Lala *Juala Prasad*, Munshi *Hanuman Prasad*, and Munshi *Sukh Ram*, for the appellants.

Munshi *Kashi Prasad*, for the respondent.

MAHMOOD, J.—The facts of this case are very simple. The appellants decree-holders are zamindárs of the village in which the land to which this litigation relates is situate, and that land was hypothecated by Musammat Katwari, judgment-debtor respondent, to the appellants on the 24th February, 1876. The money due upon that mortgage not having been paid, a suit was brought thereunder resulting in the claim being decreed on the 24th February, 1882. The decree specifically directs that the land now in question should be sold in enforcement of the lien.

By an application made on the 9th February, 1884, the decree of the 24th February, 1882, was sought to be put into execution by the decree-holders appellants, but such execution was resisted by the judgment-debtor, Musammat Katwari, upon the ground that the land which she held was an occupancy tenure which could not be transferred under s. 9 of the Rent Act, and this plea having been accepted by the lower Courts, the application for execution has been disallowed.

From the order so disallowing the application this second appeal has been preferred, and I am of opinion that it should prevail. There is no question that the land held by the respondent, Musammat Katwari, is an occupancy tenure, such as that contem-

* Second Appeal No. 1603 of 1886 from a decree of J. Dean, Esq., District Judge of Jaunpur, dated the 10th July, 1886, confirming a decree of Maulvi Nasur-ul-lah Khan, Subordinate Judge of Jaunpur, dated the 22nd September, 1886.

plated by s. 9, and within the prohibition of that section against transfer. The nature of such tenures with special reference to the question of transferability was fully discussed by me in *Gopal Pandey* v. *Parsotam Das* (1), though, I being in the minority, the majority of the Full Bench hold that the hypothecation by an occupancy tenant of his right of occupancy was not a transfer within the meaning of s. 9 of the Rent Act of 1873, which Act would govern the hypothecation of the 24th February, 1876, whereon the decree was obtained by the appellants on the 24th February, 1882. From the opinion expressed by the majority of the Full Bench in that case I still dissent with profound respect, the more so because I find it difficult to reconcile the *ratio decidendi* of that ruling with a more recent Full Bench ruling, *Ganga Din* v. *Dhurandhar Singh* (2), in which they held that an usufructuary mortgage was a transfer, and the prohibition of s. 9 of the Rent Act applied to such a case.

But it is not open to me to consider in this case the question as to the validity of the hypothecation of the 24th February, 1876, or the correctness of the decree of the 24th February, 1882, because that decree having been passed, the proceedings which have given rise to this appeal were taken only in execution of the decree, and, as such, this Court, as much as the Courts below, is bound to give effect to that decree. Mr. *Kashi Prasad*, however, contends on behalf of the respondent that the specific provisions of s. 9 of the Rent Act having prohibited transfer of such occupancy holdings, the lower Courts were right in not giving effect to the terms of the decree, and in declining to sell the property by auction in execution of that decree. For this contention the learned pleader relies on *Naik Ram Singh* v. *Murli Dhar* (3), where it was held by the Full Bench that the land-holder who had attached an occupancy right of an occupancy tenant in certain land in execution of a decree before Act XII of 1881 came into force, was not entitled under s. 2 of that Act to bring such right to sale after that Act came into force, that section not saving the right of the land-holder to bring such right to sale in execution of the decree, and s. 9 of that Act expressly prohibiting the sale of such a right in execution of a decree.

(1) I. L. R., 5 All. 121. (2) I. L. R., 5 All. 495.
(3) I. L. R., 4 All. 371.

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If the Full Bench ruling relied upon were on all fours with this case, I should of course have felt it my duty to have followed it, sitting as a single Judge, but the case is distinguishable from the one before me. In the case before the Full Bench the decree was a simple money decree, so far at least as the property which had been attached in execution thereof and to which that litigation related was concerned. In the present case the decree of the 24th February, 1882, is not a simple money decree. It is a decree which decrees a claim for money, and orders sale by specific enforcement of lien against the land which forms the subject-matter of this dispute. It may be that the decree was erroneously passed, but the Court executing that decree has no power to go behind it and to decline to execute it, because such a refusal to execute the decree amounts to nullifying the decree altogether. This view was expressed by me in the case of *Bisheshar Rai* v. *Sukhdeo Rai* (1) where the case was very similar to this, and Oldfield, J., concurred with me in holding that when a decree is passed and specifically directs the sale of a tenure which may or may not be transferable, the Court executing the decree is bound to give effect to

(1) The facts of this case are sufficiently stated in the judgment of Mahmood, J.

Munshi *Sukh Ram*, for the appellant.

Lala *Juala Prasad*, for the respondents.

MAHMOOD, J.—The facts of this case, so far as it is necessary to state them, are very simple. Sukhdeo Rai and others executed a hypothecation bond on the 10th September, 1874, in favour of Bisheshar Rai, and subsequently sold the hypothecated property to Ramjas Rai, who is the respondent in this second appeal. On the 31st March, 1882, Bisheshar Rai obtained a decree on his hypothecation bond not only against the obligors, but also against Ramjas Rai. The decree in clear and specific terms decreed the sale of the mortgaged property in satisfaction of the mortgagee's claim. The present dispute has arisen out of Bisheshar Rai's application to put in force the mandate of the Court of the 31st March, 1882. He is met by the objection that the property mortgaged is a non-saleable tenure, its sale being made illegal by s. 9 of Act XII of 1881. There is much doubt whether the tenancy here is one at fixed rates, and as such not subject to the prohibition contained in that section. The Courts below have gone behind the decree, and have arrived at the conclusion that the property mortgaged and ordered to be sold was merely an occupancy tenure, and that its sale was prohibited. Such questions could be dealt with only in the suit, but the action of the lower Courts amounts to a proceeding which practically nullifies the decree of 1882. The appellant before us complains of this, and rightly, because where a clear and specific order is made by a decree, it is not competent to a Court in its execution department to take notice of any matter except that which relates to execution. We are not concerned here as to what may be properly ordered as to third parties. As between the parties to the decree, there is nothing in s. 244 (c) which justifies such a procedure as that of declaring a decree to be illegal and refusing to carry it into execution. I do not think that the law contemplates such procedure when an application for enforcement of decree is made. I would set aside the orders of the lower Court, and direct the first Court to entertain the decree-holder's application for execution, and dispose of the same according to law. The costs of the present appellant in this and the lower Courts to be costs in the cause.

OLDFIELD, J.—I concur.

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it and not to question the validity of the decree. I still adhere to the views which I expressed in that case, and following them am constrained to decree this appeal, and setting aside the orders of both the lower Courts, to remand the case to the Court of first instance for executing the decree of the 24th February, 1882, with reference to the observations which I have made. Costs will abide the result. I wish only to add that I must not be understood to say anything as to whether the auction-sale which would take place in execution of the decree would or would not convey any valid title to the purchaser (1).

Cause remanded.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

1887
December 5.

BANSIDHAR (DEFENDANT) *v.* SANT LAL AND ANOTHER (PLAINTIFFS).*

Hypothecation—Moveable property—Non-existent moveables—Contract to assign after acquired chattels—Completion of assignment on property coming into existence—Transferee with notice of hypothecation—Suit against transferee for damages for wrongful conversion—Measure of damages.

Held, upon principles of equity, that a hypothecation of certain future indigo produce was a valid contract to assign such produce when it should come into existence; and that the hypothecation became complete when the crop was grown and the produce realized; and was enforcible against a transferee of such produce with notice of the obligee's equitable interest. *Collyer* v. *Isaacs* (2) and *Holroyd* v. *Marshall* (3) referred to.

Held also that such an interest would not avail against a transferee without notice. *Joseph* v. *Lyons* (4) and *Hallas* v. *Robinson* (5) referred to.

In a suit against such a transferee with notice, who had sold the produce, for damages for wrongful conversion of the security,—*held* that the measure of damages, under ordinary circumstances, and where a fair price had been obtained, would be the amount which the defendant had realized by the sale. *Misri Lal* v. *Mozhur Hossain* (6) referred to.

The facts of this case are stated in the judgment of the Court.

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* Second Appeal No. 1430 of 1886, from a decree of T. R. Wyer, Esq., District Judge of Meerut, dated the 22nd July, 1886, reversing a decree of Babu Brij Pal Das, Subordinate Judge of Meerut, dated the 12th April, 1886.

(1) This case was followed in *Ramgobind Das* v. *Gulzar Singh* (S. A. No. 698, of 1887) decided the 11th August, 1887, *Jugraj Puri* v. *Harbans Dyal* (S. A. No. 268 of 1887) decided the 3rd January, 1888, and *Janki Rai* v. *Ram Ghulam* (S. A. No. 896 of 1887) decided the 27th January, 1888.

(2) L. R., 19 Ch. D. 342.

(3) L. R., 10 H. L. 191; 38 L. J. Ch. 193.

(4) L. R. 15 Q. B. D. 280.

(5) L. R., 15 Q. B. D. 288.

(6) I. L. R., 13 Calc. 262.

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BANSIDHAR v. SANT LAL.

The Hon. *T. Conlan* and Maulvi *Abdul Majid*, for the appellant.

Pandit *Sundar Lal* and Babu *Ratan Chand*, for the respondents.

STRAIGHT and BRODHURST, JJ.—This was a suit for damages brought by the plaintiff-respondent against the defendant-appellant under the following circumstances. On the 13th June, 1884, one Deoki Prasad executed a bond in favour of the plaintiffs for Rs. 4,000, the material portion of which was as follows:—"For the satisfaction of the said bankers the indigo produce for 1292 fasli of mauza Jarah, mauza Secunderabad, shall remain hypothecated in lieu of the amount of the bond. I shall not sell it to any one else until the whole principal and interest of the amount of the bond, *i. e.*, the entire demand of the bond, shall have been paid." On the 5th November, 1884, the amount of the bond not having been paid, the plaintiff brought a suit against Deoki Prasad for recovery of the amount due, and attached before judgment ten boxes of the indigo produce of the mauza mentioned in the bond, which were then in the hands of the police at the Dadri police station. The present defendant Bansidhar preferred objections to this attachment, alleging that the indigo had been sold to him by Deoki Prasad. Subsequently, how does not exactly appear, he got possession of the ten boxes, forwarded them to Calcutta, and realized by their sale Rs 3,894-6-9. On the 7th of January, 1885, the plaintiffs got a decree against Deoki Prasad, but by this time their security had been appropriated by the defendant Bansidhar, as has already been stated. By the present suit the plaintiff seeks to recover the amount of Deoki's debt with interest, namely Rs 4,900, by way of damages from the defendant for his wrongful conversion of the security created by the bond of the 13th June, 1884. The first Court dismissed the claim, but the Judge in appeal decreed it for Rs. 3,894-6-9, the amount realized by the defendant on the sale of the indigo. The defendant appeals to this Court, and the substantial ground upon which the case has been argued before us is, that as, at the time of the bond of the 13th June, 1884, the indigo of mauza Jarah for 1292 fasli was not in existence, no valid pledge in law could be made, because no tangible thing was in

existence that was capable of actual or constructive possession. It was also contended that there was no evidence from which the Judge below could infer that at the time the defendant appropriated the indigo he had notice of any lien thereon in favour of the plaintiff. This latter point had best be disposed of first. As to this the Judge observes: "I am clearly of opinion that Bansidhar knew perfectly well of the lien, and I have but little doubt that the sale to Bansidhar was a collusive arrangement executed with a view to defraud the plaintiff." This conclusion he arrives at from a view of all the circumstances, and this being a second appeal we are bound by this finding of fact, unless there is absolutely no evidence to support it. The learned counsel for the appellant did not emphasize his contention on this head by reference to the proofs on the record, but we have looked to see what they were, and after doing so we are not prepared to say that there were no circumstances in evidence which warranted the Judge in drawing the conclusion he did. It therefore must be taken as a fact found against the defendant that he appropriated and sold the ten boxes of indigo with notice and knowledge of the plaintiff's claim thereto.

Then arises the main point, the nature of which has already been stated, namely, whether the instrument of the 13th June, 1884, created any valid security in favour of the plaintiff. We think that it did, and in support of this view we cannot do better than refer to the remarks of Jessel, M. R., in *Collyer* v. *Isaacs* (1). "The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels, which might be afterwards brought on the premises. That assignment in fact constitutes only a contract to give him the after-acquired chattels. A man cannot in equity any more than at law assign what has no existence. A man can contract to assign property which is to come into existence in future, and when it has come into existence, equity treating as done that which ought to be done, fastens upon that property and the contract to assign them becomes a complete arrangement." See also *Holroyd* v. *Marshall* (2).

(1) L. R., 19 Ch. D. 342. (2) L. R. 10 H. L. 191; 38 L. J. Ch. 193.

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Now we think, applying the principle thus laid down to the instrument of the 13th June, 1884, that it was a contract to assign something that was to come into existence, namely, the produce of the crop for 1292 fasli of mauza Jarah, which according to the authority of *Clements* v. *Matthews* (1) would constitute a sufficiently specific description for the purpose of creating a valid assignment in equity. The evidence establishes that the crop in question was grown and the produce of it realised before the defendant purchased it from Deoki Prasad, and putting aside the question whether it was in fact, prior thereto, handed over to the servant of the plaintiff, of which there undoubtedly is proof upon the record, so as to constitute a clear pledge, there was enough to create an equitable interest in the plaintiff in respect thereof. The equitable title so acquired by the plaintiff would no doubt in the absence of notice of that title not avail him against the defendant (see *Joseph* v. *Lyons* (2), *Hallas* v. *Robinson* (3); but here the defendant is fixed with notice, and it is found that, despite such notice, he appropriated and sold the produce. The defendant therefore was in our opinion a wrongdoer and the plaintiff had a right to damages, as against him, the measure of which would, under ordinary circumstances, where the fair price has been realized and such as subsist here, be the amount he realized by the sale. A somewhat analogous view was adopted by the Calcutta Court in *Misri Lal* v. *Mozhar Hossain* (4), and we may add that in this country, where contracts of the kind disclosed in this case, are very largely entered into with regard to the cultivation of indigo, which industry without them would be seriously hampered from a financial point of view, it is in the highest degree important that effect should be given to the obvious intentions of the parties making them, if it can be, without violence to the law or equity our Courts have to administer. We think the Judge below was right therefore in the view that he took, and we dismiss this appeal with costs (5).

Appeal dismissed.

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(1) L. R., 11 Q. B. D. 808.
(2) L. R., 15 Q. B. D. 280.
(3) L. R., 15 Q. B. D 288.
(4) I. L. R., 13 Calc. 262.
(5) See also *Rajah Sahib Prahlad Sen* v. *Baboo Budhu Sing* (2 B. L. R., P. C. at p. 117), *Ramee Bhobosoondree Dassee* v. *Issur Chunder Dutt* (11 B. L. R. 36), and *Kedari* v. *Atmarambhat*, 3 Bom. H. C. Rep. (A. C.) 11.

BENGAL SECRETARIAT LIBRARY

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1887 *December* 16.

HAR NARAIN SINGH (DEFENDANT) *v.* BHAGWANT KUAR AND OTHERS (PLAINTIFFS).*

Arbitration—Omission to fix time for delivery of award—Extension of time after expiration of period fixed—Effect of acceptance of award by the Court—Effect of arbitrator first tendering and then withdrawing resignation—Civil Procedure Code, ss 508, 514, 521.

The provision contained in s. 508 of the Civil Procedure Code, requiring the Court to fix a reasonable time for the delivery of the award is not imperative but directory, and non-compliance with it does not make the order of reference abortive and any subsequent arbitration proceedings ineffectual and bad.

Under s. 514 of the Code the Court may extend the time for making the award after the time fixed therefor has expired.

The last paragraph of s. 521 does not imply that an omission by the Court to fix a positive date within which the award is to be filed is fatal to the validity of the award.

Where an order extending the time for delivery of an award was made after the time fixed therefor had expired, and did not fix any positive date for the filing of the award,—*held* that the adoption of the award by the Court amounted to an enlargement of the time for delivery of the award to the date on which it was in fact delivered, and to a ratification of what had been done by the arbitrators, and that the parties, having made no objection to the action of the Court, must be taken to have waived any objection to the award.

The mere circumstance of an arbitrator having first tendered and then withdrawn his resignation does not formally divest him of his character as arbitrator.* *Mahdrajah Joymangul Singh Bahadoor* v. *Mohun Ram Marwaree* (1) referred to.

The facts of this case are sufficiently stated in the judgment of Straight, J.

The Hon. *T. Conlan*, Mr. *C. H. Hill*, Babu *Dwarkanath Banerji*, Munshi *Hanuman Prasad* and Pandit *Sundar Lal*, for the appellant.

Mr. *C. Dillon* the Hon. Pandit *Ajudhia Nath* and Pandit *Moti Lal Nehru*, for the respondents.

STRAIGHT, J.—The suit to which this appeal relates was instituted by the plaintiffs-respondents on the 8th February, 1884, in the Court of the Subordinate Judge of Agra, for the recovery of certain valuable property of various kinds and for money from

* First Appeal, No. 73 of 1885, from a decree of Maulvi Muhammad Saiyad Khan, Subordinate Judge of Agra, dated the 6th April, 1885.

(1) 23 W. R. P. C. 429.

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the defendant-appellant. On the 16th July, 1884, an agreement to refer all matters in difference in the suit to the arbitration of Lalas Bansidhar and Jagannath Prasad, nominated by the plaintiffs, and Lalas Radho Prasad and Janki Prasad, nominated by the defendant, with Lala Sukhan Lal as umpire, was filed in Court, and on the 17th of July an order of reference was made by the Subordinate Judge, the 19th August, 1884, being fixed therein for the hearing of the case by this Court, or in other words, such last-mentioned date was that fixed for the delivery of the award. On the 9th August the time for delivery of the award was enlarged to the 5th November, and again on the 4th November to the 30th of the same month. On the 5th of December, there was an application for further extension, and this was granted until the 5th January, 1885. On the 5th January, the umpire having put in a report, a further extension of time was granted until the 19th January, 1885. Subsequently, the arbitrators having met, an award was made by them on the 23rd March, 1885. That award was filed in Court, and to it certain objections were taken by the defendant upon the 2nd April, 1885. The defendant's pleaders were heard in support of those objections, ultimately upon the 6th April. The Subordinate Judge disallowing them, passed a decree in accordance with that award. From that decree the appeal now before us was preferred to this Court upon the 2nd May, 1885.

There are three grounds of appeal which in substance are, *first*, that the award was not a valid award; *second*, that one of the arbitrators having refused to act, either a fresh arbitrator should have been appointed in his place or that the order of reference should have been superseded, and that this not having been done, there was no valid award; *third*, that Janki Prasad was an unwilling arbitrator and acted against his will, and the arbitration proceedings and award were therefore void.

The appeal came before my brother Tyrrell and myself upon the 29th March, 1886, and in reference to the pleas that had been taken, more particularly the plea which had reference to Janki Prasad, one of the arbitrators, the matter was remitted to the Subordinate Judge for him to take evidence and to report to us whether Janki Prasad had acted judicially and voluntarily in the arbi-

tration proceedings. That evidence has been taken and is before us, and in addition thereto we have a report from the Subordinate Judge in regard to that evidence. The appeal now comes before us for disposal in reference to the pleas taken in the memorandum of appeal with the light thrown upon them by the materials supplied us by the Subordinate Judge.

Mr. *Conlan* and Pandit *Sundar Lal*, who argued the case on behalf of the defendant-appellant, have substantially put their case upon two grounds. First of all, they say there was no valid award, because on the 5th December, when the third extension of time was granted, the prior period of extension had expired, and next, because in the order of the 5th January no date was fixed as the date by or upon which the award was to be delivered. The second ground upon which the award is assailed is that as Janki Prasad had tendered his resignation as arbitrator, and as it is obvious from the evidence that he did not act willingly and freely in the arbitration proceeding, such proceeding was invalid and the award arising out of it void.

Now as to the first of these objections, that has been argued in reference to the terms of ss. 508 and 514 of the Civil Procedure Code, read in conjunction with the last paragraph in s. 521. It is contended by Mr. *Conlan* as a primary proposition of his argument, that under s. 508 it is the imperative duty of a Court directing an arbitration by its order of reference to fix a time for the delivery of the award. He says that the word "shall" as used therein is not merely directory but mandatory, and that if a Court directs a reference without fixing a date in the order for the delivery of the award, the order of reference falls through and any arbitration proceedings held under that order are ineffectual and bad. Starting with this proposition, Mr. *Conlan* then contends that under s. 514, when a time has been fixed by the Court for the delivery of the award, it is only competent for such Court to further enlarge the time on some day within the original period fixed for the delivery of the award, or within any subsequent period to which such original period has been extended. He accordingly argues that the Subordinate Judge in the present case, when he made his order of the 5th December, had no jurisdiction to do so, because the 30th November being the last date covered by the preceding

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order of extension, his power in the matter had ceased, and the authority of the arbitrators to deal with the case had lapsed.

Now there can be no doubt that looking to the whole scope and purpose of the earlier sections of Chapter XXXVII of the Civil Procedure Code relating to arbitrations held under the sanction of a Court of justice, the Court which makes the order of reference is intended to have complete control in the matter. The words in s. 514 are "the Court may *if* it thinks fit"; it does not require it to act only upon the application of the parties or of either of them, and it is obvious that the Court may of its own motion grant an enlargement of time. No doubt in s. 508 the words are "*shall* fix such time," &c., but it seems to me that this amounts to no more than the imposition of a public duty on the presiding officer of a Court of justice, and that as the neglect of it, through mistake or error on his part, could not affect the substantiality of the proceedings of the arbitrators or their award, they may reasonably be regarded as not mandatory but directory only. To hold otherwise would in my opinion "involve general inconvenience or injustice to innocent persons without promoting the real aim and object of the enactment." (Maxwell on the Interpretation of Statutes, p. 452). If this is the correct view, then the same construction may be placed on s. 514. In this connection I have directed my attention to certain English rulings which seem to me to some extent to be *in pari materiâ*. Now there is a provision to be found in the Common Law Procedure Act of 1854 that has received interpretation in the Courts in England, which to my mind has some bearing on the point before us. Those decisions have reference to s. 15 of that Act, (17 and 18 Vic., c. 125). The first of those cases is *Lord* v. *Lee* (1). There the learned Judges, more particularly Mr. Justice Blackburn, who was the senior presiding Judge, went very fully and clearly into the principles governing arbitration proceedings. There an arbitrator appointed by a private agreement in writing, which contained no limit of time, made his award more than three months after he had entered upon the reference. The submission was then made a rule of Court, and a learned Judge to whom application was made in chambers enlarged the time. The award was taken up by the successful party and he brought

(1) L. R., 3 Q. B. 404.

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an action upon it. That action was tried before Mellor, J., at the sittings in Middlesex after Trinity term, 1867. It appeared that there being matters in difference between the plaintiff and defendant, an agreement of reference was made and signed on the 8th August, 1866. No time for making the award was mentioned in the submission. The arbitrator entered upon the reference at once. On the 17th January, 1867, he made his award, and gave notice the same day that he had made it. On the 7th February the submission was made a rule of Court; and on the 11th March a Judge's order was obtained directing "that the time for the arbitrator to make his award be enlarged till the 15th March instant." The award was taken up on the 14th March and was in favour of the plaintiff. A verdict was directed for the plaintiff for the amount awarded, with leave to move to enter it for the defendant. A rule was obtained accordingly, on the ground that the time for making the award had not been duly nor legally enlarged by the arbitrator, and the Court or Judge had no power to enlarge the time after the award had been made.

It will be seen that in this case no time was fixed in the agreement of arbitration. But the statute law stepped in to fix the time. By s. 15 of the Common Law Procedure Act it was enacted that "the arbitrator..... shall make his award under his hand and (unless such document or order respectively shall contain a different limit of time), within three months after he shall have been appointed and shall have entered upon the reference or shall have been called upon to act by notice in writing from any party; but the parties may by consent in writing enlarge the time for making the award; and it shall be lawful for the superior Court of which such document or order is or may be made a rule of Court or of any Judge thereof for good cause to be stated in the rule or order from time to time to enlarge the term for making the award."

Therefore in that case there was the following state of facts:— That there was no mention in the agreement of any time; that under the terms of the statute the time applicable would be three months after the appointment of the arbitrator and his entering upon the reference, that he did not promulgate his award within three months from that date; that he did promulgate it long after

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the statutory period; that after such award have been so promulgated, the agreement of the parties was made a rule of Court; and that even after that, the Court thought fit and proper to enlarge the period for making the award. In that case Mr. Justice Blackburn in a judgment which put the matter most clearly, pointed out the principle which was applicable to such cases, and upon which that statute proceeded, and those remarks seem to me applicable to the statute with which we have to deal here. He says: "I feel no doubt that, under the clause in the section which says that 'it shall be lawful for the Court or Judge for good cause, from time to time, to enlarge the time for making the award' the Judge may at any time give such further time to the arbitrator to make his award as he shall think fit under the circumstances, so as to make it as if the further time had been originally given in the submission. Thus, if the time originally limited was twelve months, and the Judge gives six months more, it is the same as if the time had been from the first eighteen months, and the effect is to make any step taken by the arbitrator within eighteen months valid."

Then he proceeds to go on and discusses what the state of things was with reference to arbitration under the common law, and he says:—"So if an arbitrator omits to enlarge the time limited for making his award, but continues to act as if he had enlarged it, even to making his award, although in fact he has no authority, yet he is a person *animo agendi*, and if the parties afterwards choose to ratify his act by agreeing that the time shall be enlarged or otherwise, though the act was not enforcible yet, if ratified, it would be just as binding as if done with the original authority. It was argued for the defendant that such an enlargement of the time amounted only to the making of a fresh submission, but that is not so; the act having been done under the professed authority of the previous submission, the enlargement of the time is a ratification in the shape of a continuation of the original authority."

Then he goes on and refers to s. 15 of the Common Law Procedure Act (17 and 18 Vic. c. 125) and says:—"The Common Law Procedure Act, s. 15, after limiting the time to three months, when the submission is silent as to the limit of time, gives the parties themselves power to enlarge the term; and the effect of this

enlargement of the term under the statute would be the same as at common law, that is, it makes it as if the extended time had been originally inserted in the submission. The same construction must be given to the clause giving power to the Court or Judge to enlarge the time, and if an enlargement by consent of parties amounts to a ratification of all that has been done in the interval, inasmuch as it amounts to saying that the submission shall be read as if the extended time had been originally inserted, then the award, which had been made in the interval after the three months had expired, and before the order for enlargement was made, as it purported to be made under the authorities of the parties, would be valid; if the authority were subsequently ratified by the parties by enlargement. The same power is given to the Judge, in his discretion, from time to time to enlarge the term, notwithstanding the parties do not consent, and it must have the same effect as an enlargement by consent, namely, amount to a ratification. The evils of an opposite construction are obvious. Suppose the arbitrator inadvertently to have neglected to enlarge the time, and several meetings to have been held in the interval before the omission is discovered: if the subsequent enlargement of the time had only the effect of a new submission, all the witnesses must be recalled, and all the expense must be incurred again. It happens in the present case that the award was made before the oversight was discovered and the order obtained. Surely it is a very salutary enactment which enables a Judge to cure a defect which he thinks a mere defect of form, and which the parties might have cured themselves. I am, therefore, clearly of opinion that the section gives power to the Judge to enlarge the term for making the award at any time, and under any circumstances, in which he thinks there is good cause for his intervention; (of course he would not grant an order if he saw that injustice might be done thereby), and the effect of the enlargement is the same as if it had been by the parties; it amounts to a ratification, and is as if the enlarged time had been originally in the submission."

It seems to me that the case, which is supported by another to which I need only give reference namely, *May* v. *Harcourt* (1) goes to show that there is nothing unreasonable in the view that we

(1) L. R., 13 Q. B. D. 668.

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are prepared to take, that the provisions of s. 514 do allow of the Court at any period of its own motion or on the application of the parties, granting an enlargment, as was done in the present case by the order of the 5th December, 1884.

Then arises the further question as to whether the terms of the order of the 5th January, by which no positive date was fixed within which the award was to be filed, are fatal to the validity of the award. I do not think they are. I think that the same principle of interpretation which I have stated as applicable to s. 508 and the word "shall" therein is applicable, and that the neglect or omission of the Court cannot prejudice the proceedings before the arbitrators or their award. If this be so, then there would be no time appointed within which the award could be filed, which would bring into operation the provision contained in the last paragraph of s. 521. At any rate, whatever defects there may have been in the order of the Subordinate Judge of the 5th January, 1885, they were in my opinion defects that could be cured, and I hold that the adoption by the Subordinate Judge of the award must be taken to amount to an enlargement of the time for the delivery of the award to the date on which it was in fact delivered and to ratification of what had been done by the arbitrators. Moreover, no objection was taken by either of the parties to his acceptance of the award on the ground now urged, and it seems to me not unreasonable to assume that any such objection was waived by them.

The second question which was argued by Mr. *Sundar Lal* relates exclusively and entirely to the arbitrator Janki Prasad having refused to act, that the Court should have appointed either a new arbitrator in his place or have superseded the arbitration, and further that after his refusal to act he was incompetent to act any further in the matter. Now I have very carefully read through all the evidence that has been taken by the Subordinate Judge upon this particular point. I do not see the slightest ground for supposing that Janki Prasad did not take a complete and full part in all the proceedings of the arbitrators held in respect of the differences between the parties to the suit. It is to be noted that all the other three arbitrators have been called and examined, and I may more particu

larly notice that Radhe Lal, the first of the two arbitrators nominated by the defendant-appellant before us, deposes in most explicit terms to Janki Prasad's having taken part in the arbitration proceedings, to his having been present at every meeting and to his having taken an intelligent share in the proceedings. Then there is the statement of Sukhan Lal, the umpire, to the effect that he and Janki Prasad examined the account-books together, Janki Prasad, as a mahajan having been selected as an arbitrator more particularly for this part of the work. I have also read very carefully through the various representations that were made to the Court and the umpire for the purpose of obtaining adjournment, and I find nothing to satisfy me that any arbitration meeting was held without the presence of Janki Prasad. It is said by Mr. *Sundar Lal* that looking to the terms of the order of the Subordinate Judge which was passed upon the 24th January, 1885, Janki Prasad was frightened into coming and attending the arbitration proceedings, and no doubt there are indications that the Subordinate Judge thought that Janki Prasad's excuses for absenting himself were not *bonâ fide*, and though he had no power to compel him to serve, it seems to me he was at least erring on the right side in endeavouring to get him to join his colleagues and hold the arbitration. At any rate it is clear that after Janki Prasad sent in his resignation he did meet Sukhan Lal, the umpire, and the three other arbitrators, and had a conversation with them, the result of which was that he reconsidered his determination and withdrew his resignation. In this connection I may refer to the authority of their Lordships of the Privy Council, which lays down in very explicit terms that the mere circumstance that an arbitrator had first tendered and then withdrawn his resignation, did not formally divest him of his character of arbitrator: *Maharajah Joymungul Singh Bahadoor* v. *Mohun Ram Marwaree* (1).

In the Court below when the objection that I am now dealing with was taken for the first time, it was not suggested that there had been misconduct on the part of this man Janki Prasad. What was suggested was that he was an unwilling participator in the arbitration proceeding. It is not my business now to determine whether upon the story he tells, if true, he was guilty of such

(1) 23 W. R., P. C., 429.

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misconduct as would have warranted the Court below in setting aside the award, for I do not believe it, and I prefer the statements of the three arbitrators and the umpire, who very plainly gave an account of all that transpired in the cause of the arbitration proceedings, and certainly leave the impression on my mind that Janki Prasad took a conscious, intelligent and voluntary part in the proceedings. This disposes of the second objection. I therefore am of opinion that the award was a good award, and that we have no right to interfere with the decree which was passed in accordance with that award. The appeal is dismissed with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

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December 16.

CRIMINAL REVISIONAL

Before Mr. Justice Straight and Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* ZOR SINGH.

Act XLV of 1860 *(Penal Code), ss.* 380, 454—*House breaking in order to the commission of theft—Theft—Separate convictions and sentences—Criminal Procedure Code, ss.* 35, 235—*Practice—Revision—Criminal Procedure Code, s.* 438—*Reference by Magistrate of orders passed by Sessions Judge.*

Under ss. 35 and 235 of the Criminal Procedure Code a Magistrate may legally pass a separate sentence of two years' rigorous imprisonment and fine under each of the sections 379 or 380 and 454 of the Penal Code, for house-breaking in order to the commission of theft and theft, the two offences forming part of the same transaction and being tried together. In such a case, where the prisoner had been three times previously convicted,—*held* that the better course would have been to commit him to the Court of Session under ss. 454-75 of the Code.

But a Sessions Judge trying such a case under s. 379 or s. 380 and s. 454 would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 and of four years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-breakers who had not only intended to commit but had actually committed theft.

Queen-Empress v. *Ajudhia* (1) and *Queen-Empress* v. *Sukharam Bhan* (2) referred to.

A Magistrate is not justified in referring under s. 438 of the Criminal Procedure Code orders passed by the Sessions Judge on appeal, except in very special cases. *Queen-Empress* v. *Shere Singh* (3) referred to.

(1) I. L. R., 2 All. 644. (2) I. L. R., 10 Bom. 492.
(3) I. L. R., 9 All. 367.

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QUEEN-EMPRESS v. ZOR SINGH.

THIS was a reference under s. 438 of the Criminal Procedure Code, made under the following circumstances. The Joint Magistrate of Etáwah in a case that was before him for hearing, charged one Zor Singh, first, with having on or about the 17th September, 1887, committed house-breaking in order to the commission of theft in the shop of Lala Ram Bania, and with having thereby committed an offence punishable under s. 454 of the Indian Penal Code; and secondly, with having, on or about the 17th September, 1887, committed theft of one anna's worth of cowries in the house of the said Lala Ram Bania, and with having thereby committed an offence punishable under s. 380 of the Indian Penal Code. Zor Singh pleaded guilty to having entered Lala Ram's shop by climbing over the tatti fastened against the door-way, and to having stolen thence the cowries. The Joint Magistrate observed that the accused "has been three times previously convicted and sentenced to seven days' imprisonment, twenty stripes, and two years' imprisonment. I do not think, however, there is any necessity of committing him for trial by the Court of Session, as I have charged him under ss. 454 and 380, Indian Penal Code, two distinct offences having been committed, and separate sentences being legal, [vide *Queen-Empress* v. *Sakharam Bhan* (1)]. I deal with the case therefore according to the provisions of s. 35, Criminal Procedure Code. Prisoner's last conviction was under s. 454, Penal Code. I convict him of an offence under s. 454, Penal Code, and sentence him to two years' rigorous imprisonment and thirty stripes; and I convict him of an offence under s. 380, and sentence him to two years' rigorous imprisonment, to include three months' solitary confinement. The second sentence to follow the first." The prisoner preferred an appeal to the Court of Session, and the Sessions Judge, in disposing of it, observed: "It is true, as remarked by the Joint Magistrate, that the Bombay High Court has held separate convictions in such a case to be legal. But in a similar case the Allahabad High Court set aside the sentence under s. 380: *Queen-Empress* v. *Ajudhia* (2). I prefer to follow the ruling of our own High Court, and set aside the conviction and sentence under s. 380. The accused pleaded guilty to the first charge, and no ground is shown for interference with the conviction under s. 454. Although the

(1) I. L. R., 10 Bom. 493. (2) I. L. R., 2 All. 644.

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value of the property stolen was trifling, the appellant had been three times previously convicted, and the sentence is not too severe."

The Magistrate of Etáwah submitted a letter to the Registrar of the Court, in which he stated the facts above referred to, expressed the opinion that the sentence, as modified by the Judge, was inadequate, and suggested that, as the sentences passed by the joint Magistrate were in accordance with the ruling of a Bench of the Bombay High Court under the Criminal Procedure Code, Act X of 1882, now in force, they should be restored.

BRODHURST, J., (after stating the facts, continued).—The judgment reported in I. L. R., 2 All. 644, was delivered by my brother Straight on the 19th January, 1880, when Act X of 1872 was the Code of Criminal Procedure. He did not rule that a conviction and sentence under each of the sections 380 and 457 of the Indian Penal Code for offences arising out of the same transaction was absolutely illegal, but he held that "in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the graver offence proved." I notice that a similar view was taken by a Full Bench of the Calcutta High Court in their judgment in the case of the *Queen* v. *Ramcharan Kairi* (1). The head-note is as follows:—"The prisoner was convicted by the Magistrate of two separate offences under ss. 456 and 380 of the Penal Code, and sentenced for both. On appeal the Sessions Judge, holding that the offence proved was under s. 457, ordered a new trial for offences under ss. 457 and 380. *Held* that there ought not to be a new trial, but that the conviction and sentence under s. 380 should be set aside." And Peacock, C. J., in a judgment concurred in by the other learned Judges, observed: "The Magistrate should be cautioned to be more careful in future, and not to split up one single aggravated offence into separate offences." The judgments above referred to of the Bench of the Bombay High Court were delivered by Birdwood and Jardine, JJ., on the 25th February, 1887, that is, since the present Criminal Procedure Code, Act X of 1882, has been in force, and certain alterations have been made in the Code as pointed out by the above-mentioned learned Judges. Illustration 6 to paragraph I of s. 235 shows that,

(1) B. L. R. Sup. vol., p. 488.

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if "A commits house-breaking by day, with intent to commit adultery with B's wife, A may be separately charged with and convicted of offences under ss. 454 and 497 of the Indian Penal Code." It admits I think of no doubt that the Joint Magistrate might, with reference to the provisions of ss. 35 and 235 of the Criminal Procedure Code, have tried and convicted Zor Singh for house-breaking in order to commit theft and for theft, and might have sentenced him under the first part of s. 454 of the Penal Code to two years' rigorous imprisonment for house-breaking and under s. 379 of the same Code to two years' rigorous imprisonment for theft. Moreover I am of opinion that the sentences as passed were not illegal, but the best course to have adopted would, in my opinion, have been that which is usual in such cases, *viz.*, to have committed the accused for trial to the Court of Session, under ss. 454-75 of the Indian Penal Code. Although I consider that a Magistrate might legally pass a separate sentence of two years' rigorous imprisonment and fine under each of the sections 379 or 380 and 454 of the Penal Code, I nevertheless think that, were a Sessions Judge trying such a case under the same sections, he would, under no circumstances, be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 for house-breaking with intent to commit theft, and, with reference to the provisions in s. 35 of the Criminal Procedure Code, of four years' imprisonment under s. 380 for theft in a building, for it appears to me obvious that this could not have been the intention of the Legislature. The offences punishable under ss. 454 and 457 of the Penal Code are, with the exception that the former is committed by day and the latter by night, precisely the same. The latter part of each section enacts that, if the offence intended to be committed is theft, the term of imprisonment may be extended from three and five years to ten and fourteen years respectively. An intent to commit theft would not be punishable until after lurking house-trespass, or house-breaking, had been committed. It is evident that the Legislature never meant that a house-trespasser or house-breaker should be liable to seven and nine years' additional imprisonment, merely because he intended to commit theft. The latter portion of each of those sections was obviously framed to include the cases of house-trespassers and house-breakers who

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had not only intended to commit theft, but had actually committed that offence. To sentence a house-trespasser or house-breaker to the enhanced punishment of ten years' imprisonment under the latter part of s. 454, because he intended to commit theft, and to sentence him also under s. 380 to four years' imprisonment, or any other punishment for theft in a building, would virtually be to punish him twice for the same offence, and would be grossly unjust. Had the Joint Magistrate in the exercise of a wise discretion adopted the course I have above mentioned, that is, had committed Zor Singh under ss. 454-75 of the Penal Code to the Court of Session, there would have been no ground whatever for this reference. I think for the reasons recorded by my brother Straight in *Queen-Empress* v. *Shere Singh* (1) that references such as this, by a Magistrate against the order passed in appeal by his superior officer, the Sessions Judge, are generally inconvenient and undesirable, and are only justifiable in very special cases; and having regard to all the circumstances of the case, I do not think that any interference in revision is necessary in the present instance.

STRAIGHT, J.—I entirely concur in the view of my brother Brodhurst, that this is not a case in which we should interfere. Let the Magistrate be so informed.

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December 20.

FULL BENCH.

Before Sir John Edge, K.T., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

QUEEN EMPRESS v. IMAM ALI AND ANOTHER.

Act XLV of 1860 *(Penal Code), s.* 295—*"Object" held sacred by any class of persons—Killing cows in a public place.*

The word "object" in s. 295 of the Penal Code does not include animate objects.

In this case two Muhammadans, Imam Ali and Amiruddin, were convicted by Mr. E. T. Lloyd, a Magistrate of Shâhjahânpur, of an offence punishable under s. 295 of the Penal Code (destroying an object held sacred by any class of persons), and were each sentenced to pay a fine of Rs. 25. It appeared that each of the

(1) I. L. R., 9 All. 362.

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accused had, on the day of Íd, the 30th August, 1887, killed a cow in a place within a few yards of a public road, exposed to public view. The Magistrate found that there were two slaughter-houses in the town of Tilhar where the cows were killed, that it was customary for sacrifices of cows to be made inside the premises of Muhammadans, that the road near which the prisoners had killed cows was frequented by Hindus, who on "seeing a cow being killed or dead by the side of the road must be much disgusted and distressed," but that cows had on previous occasions been sacrificed in the same place without the Hindus making any complaint. The prisoners applied for revision of the Magistrate's order to the Sessions Judge of Sháhjahánpur, who referred the case to the High Court under s. 438 of the Criminal Procedure Code, by the following order :—

"The applicants, Amiruddin and Imam Ali are Muhammadans resident in the town of Tilhar. On the day of Íd, according to their religious customs, they sacrificed a cow within four or five yards of a public road. They have been convicted under s. 295 of the Penal Code, of having, I presume, 'destroyed an object' (to wit, a cow) 'held sacred' by the Hindus resident at Tilhar.

"Apart from the doubt I hold that the conviction can be sustained under this section, I think it is bad for the following reasons :—

"1. The lower Court admits that there is strong reason to believe that cows have been sacrificed before in this very spot, and without the Hindus preferring any complaint, 'despairing of obtaining any redress.' The practice has therefore the sanction of previous custom or use.

"2. There are no Hindus dwelling immediately proximate to the place where the cow was sacrificed. The surrounding dwellings are those of Muhammadans, and though a Hindu might have had his feelings outraged or his religious prejudices hurt had he passed that way, there is no reason to believe that such was the case.

"3. It is not established that the applicant ever meant to outrage any such feelings or prejudices. It is just possible, in the strained relations that now exist between Hindus and Muhamma-

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dans, that he stretched his privilege or custom to its extreme limit; but I cannot think that in sacrificing where previous sacrifices had taken place, he violated any rule of law that would subject him to a criminal prosecution.

"The executive have been given most ample powers, especially in municipal towns like Tilhar, to make rules and regulations for matters like the present. It is to be regretted that certain places were not marked out and proclaimed as fit places for such sacrifices; but I cannot think that under the present circumstances the applicant is shown to have infringed any rule, law, or regulation whatever.

"The doubt of applicant's guilt that the Magistrate held should have gone rather to prompt an acquittal than to reduce the sentence. The record will be submitted to the High Court for orders that to it may seem fit."

The reference came before Straight and Brodhurst, JJ., who directed that it should be laid before a Full Bench.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

The prisoners were not represented.

EDGE, C. J.—Two men, Imam Ali and Amiruddin, were convicted by the Magistrate of Sháhjahánpur under s. 295, Indian Penal Code, for having on the 30th August, 1887, at Tilhar municipality on the side of Muazampur street, destroyed each a cow by the side of a public highway. The Magistrate found that they knew very well that the killing of the cow was considered an insult by their Hindu fellow-subjects, and he fined them Rs. 25 each. The case has come up to us in revision, and the sole question to consider is whether a cow is an "object" within the meaning of s. 295, Indian Penal Code. The earlier words of that section are as follows:—

"Whoever destroys, damages, or defiles any place of worship, or any object held sacred by any class of persons."

If I were to apply the usual principle of construction to this section, I should come to the conclusion that it was intended that the "object" should be one *ejusdem generis* with a "place of worship," that is, some inanimate object such as an idol, &c. In my opinion the intention of the Legislature in passing this section was to

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use the term "object" in that sense, and the Legislature did not intend that the term should apply to animate objects such as cows. If it had been intended that the term "object" here should not be construed as relating to something *ejusdem generis* with the place of worship, but should have a wider meaning, I should have expected to find in the definition clause the word "object" defined. But there is no such definition. The words 'animal,' 'man,' 'woman' and 'person' are there defined. It is admitted by the Government Pleader, who appears in support of this application, that the killing of a cow under any circumstances, of course except by accident, would be considered an insult by a strict Hindu. If that be so, any butcher who knew that fact and killed a cow, even in his private slaughter house, or for the matter of that in a public slaughter house, would be guilty of the offence contemplated by s. 295 of the Penal Code.

I, therefore, come to the conclusion that s. 295 of the Penal Code does not apply to this case, and consequently that this conviction must be set aside, and the fines, if realized, be refunded.

STRAIGHT, J.—I entirely concur that a cow is not an object within the meaning of s. 295 of the Indian Penal Code. It seems to me that the words in connection with which it is used, namely, destroys, damages or defiles, preclude the notion that a cow does come within the definition. I think, therefore, that these convictions should be set aside, and the fines, if realized, should be returned.

BRODHURST, J.—In my opinion the killing of a cow as a sacrifice or otherwise is not an offence punishable under s. 295 of the Indian Penal Code.

The words "destroys" and "object," as used in that section, could not, I consider, have been intended by the Legislature to have, under any circumstances, included the killing of a cow. Had it been intended that the killing or maiming or injuring of things animate, such as a cow or a monkey or a peacock or a jay, should have been included as offences punishable under s. 295, language more appropriate than "destroys, damages or defiles" "any object" would have been brought into use; and such words as "or kills, maims or otherwise injures any animal" would have been inserted

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between the words "any object" and the words "held sacred by any class of persons."

The whole construction of the section as it stands shows, I think, that it refers only to inanimate objects such as churches, mosques, temples and marble or stone figures representing gods.

Under this view of the law, I would set aside the convictions of Imam Ali and Amiruddin, and direct that the fines, if realized, be refunded.

TYRRELL, J.—I concur with the learned Chief Justice.

MAHMOOD, J.—I concur so entirely in the exposition of the law to which the learned Chief Justice and my learned brethren have given expression that I consider it unnecessary to say much upon that aspect of the case. The section (295 of the Penal Code) which we are called upon to consider occurs in a penal enactment; and according to the well-recognized rules of interpretation of the language of statutes, words importing a doubtful or ambiguous meaning must be construed strictly and in favour of the subject, that is to say, that unless the meaning of the Legislature is perfectly clear, no penalties are to be imposed upon the subjects of the Crown nor are their liberties to be restricted. This canon of construction has been uniformly applied to the interpretation of a vast multiplicity of statutes in England and also in India, and I do not think any doubts have been thrown upon it. There is also another well-recognized rule of construing statutes to which the learned Chief Justice has already referred, namely, that the operation of words of a general signification is restrained "when they follow closely upon words of a limited meaning, upon words which refer to a particular class of things or persons, or which necessarily excludes such matters as are of higher dignity. In all these cases general words are confined to things and persons *ejusdem generis* with those enumerated or of inferior quality." (Wilberforce, p. 179.) Now in this case the words "any object" occur in such close proximity to the phrase "*any place of worship*," which phrase again follows upon the words "*destroys, damages or defiles*," that as the learned Chief Justice has pointed out, we cannot extend the meaning of the word "*object*" to animals, and that we must interpret it by the rule of *ejusdem generis*. This conclusion is further supported by

another rule of interpreting statutes, namely, that when words importing a popular meaning are employed in a statute, they ought to be construed in such a sense, unless the Legislature has defined such words in any other sense. Now the word object no doubt has a technical and extensive meaning in philosophy and would include not only an animal but also a human being, and indeed if we go further, the word would in philosophy include also abstract concepts. But such is not the manner in which the popular mind understands the words, nor can we attach any such meaning to the word in interpreting a penal enactment such as s. 295 of the Indian Penal Code. The Code devotes a whole chapter (II) to the explanation of certain general expressions which it employs, and considering that it defines the words "*animal* (s. 47) as also the words "*man*" and "*woman*" (s. 10), it seems to me that if the word "*object*" as it occurs in s. 295 of that Code were to be interpreted by us to include a cow or any other animal, there would be no logical reason why we should not include a human being within the meaning of that word. I have no doubt therefore that the words "*any object* held sacred by any class of persons" must be understood to be limited to inanimate objects.

But there is another aspect of this case in respect of which I wish to give expression to my views consistently with the rule of judicial etiquette which requires that Judges should abstain from taking part in matters of a purely political character. Facts similar to those out of which this prosecution has arisen are not of unfrequent occurrence, and sometimes cause breach of the peace, of which I as one of Her Majesty's Judges feel myself entitled to take notice. As my brother Brodhurst has pointed out, the bovine species is not the only class of animals held sacred by the Hindu population of India, and indeed I may add that even trees, such as the *pipal*, are included among the objects of worship or veneration by that section of the community—a state of things which only shows how serious, in connection with such matters, is the task of those who as Judges are bound to administer justice in conformity with the laws of the land.

I think it is not beyond my province as a Judge of this Court to take judicial notice of the religious history of the Hindus as

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also of the Muhammadan ecclesiastical law in so far as they bear upon the facts of this case. So far as I am aware it appears to me that in the ancient times of the Hindu history just as *aswamedha*, or the sacrifice of a horse, was allowed as a symbol of imperial domination, so upon other occasions of ritual ceremonies *gaumedha*, or cow sacrifice, was permitted and almost enjoined by the ancient sages of the Hindu religion. No doubt, with the progress of time, the advance of civilization and the development of utilitarian ideas among the people, both these sacrifices fell into disuse, and the cow as the furnisher of milk and the mother of the bovine species (so universally employed in this country for purposes of agriculture) rose from being an object of utility to the footing of sanctity. The law, however, in dealing with such matters is not concerned with facts as they were in ancient times, but with living facts of modern times, and we as Judges cannot ignore the fact that among the Hindus of the present day the cow is regarded as perhaps the most sacred animal, though this circumstance would not, for the reasons which I have already mentioned, affect the interpretation of the word "*object*" as it occurs in s. 295 of the Indian Penal Code. I also know that under the Muhammadan ecclesiastical law, on the *Id-ul-Zuha* (or *Id-e-kurban*) as the anniversary of the great pilgrimage of Mecca, the sacrifice of a camel, a buffalo, a cow, a sheep, or any other quadruped, whose meat is lawful food to the Muslim is enjoined. I am equally aware of the fact that so far as the poorer sections of the Muhammadan population are concerned, the only chance which they practically have of eating meat is to rely upon the cheapness of beef in comparison to mutton or meat of any other kind. It may or may not be so that until somewhat recent times the Hindus and the Muhammadans living as close neighbours were accustomed to be considerate to each other, and respecting each other's feelings, did not recklessly hurt the religious prejudices of each other in such matters. But from the number of cases which come up to this Court in the exercise of its criminal jurisdiction as the highest tribunal in the land, I cannot but conclude that with the change of the times a most unsatisfactory and reprehensible state of things has come into existence which it is the duty of those entrusted with the administration of justice, in the impartial and even-handed form which the law of

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British India enjoins, to recognise and deal with. Speaking for myself I have had before now considerable difficulty in deciding how Courts of justice are to deal with such matters, how the law stands with reference to cases in which in the most offensive manner the slaughter of a cow is accomplished by a Muhammadan before the eyes of a Hindu fellow-subject, or cases in which a Hindu procession is carried with offensive demonstrations in front of a Muhammadan mosque. Similar difficulty I have felt in connection with the bearings of the law in cases where the Hindu procession of the *Ram Lila* takes place on the same occasion as the Muhammadan procession of the *Moharram*. The one is a day of rejoicing with the Hindus as the anniversary of the greatest victory in their history; the other is the anniversary of what has been called "the darkest day of Islam," and as such the occasion of deepest mourning. It may be that on such occasions (as I am afraid is often the case) events may occur which would constitute the *corpus delicti* of one or other of the various offences relating to religion dealt with in Chapter XV of the Indian Penal Code, and indeed it may be that those events require the application of even severer sections of that Code. There can scarcely be any doubt that the difficulties with which Courts of justice have to deal in such matters arise from the fact that Her Majesty's subjects in India having long been accustomed before the advent of the British rule to oppressive methods, cannot easily accommodate themselves to the new state of things ushered into existence by the British Government, under which religious toleration and individual liberty of the citizen is recognized to an extent which, according to some deep thinkers, was too much in advance of the stage of civilization which the country had attained. Quite recently in Crim. Rev. No. 629 of 1887 (1) I had to deal with a somewhat similar matter. There the dispute was not between Hindus and Muhammadans, but between two sections of the Hindu community, that is, between the *Vaishnavas* and the *Saraogis* in connection with a religious procession of the latter to which the former objected. Similarly quarrels arise between the two sections of the Muhammadan community—the *Sunnis* and the *Shiahs*—in connection with the uttering of certain words which are most offensive to the religious feel-

(1) *Queen-Empress* v. *Sheodin*, *ante*., p. 115.

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ings of the *Sunni* Muhammadans, and which words might in some circumstances fall under the purview of s. 298 of the Indian Penal Code. I have no doubt that the Legislature in framing Chapter XV of the Indian Penal Code has made a great advance in the direction of the religious toleration which civilized methods of thoughts enjoin, and if difficulties arise in connection with such matters, they are due not to any defect of the law but to the inconsiderate and reckless behaviour of the various sections of a population which does not fully appreciate the blessings of religious toleration and individual liberty which the British rule by framing wise laws has accorded to the people of this country.

Having regard to the facts of this case as they appear from the judgment of the Magistrate and of the learned Session Judge, I cannot help feeling that it was imprudent and inconsiderate on the part of the accused to have slaughtered cows on the road-side and in a locality which would be visible to any Hindu passer-by, and I think I may say as a Muhammadan myself that it is difficult for me to conceive that the gentlemanly feelings of any person belonging to the better classes of the community which professes Islamism would even on the festival of the *Id-ul-zuha* permit the sacrifice of a cow in violation of considerations suggested by the religious feelings and prejudices of his Hindu fellow-subjects and neighbours with whom the Musalmans have for centuries associated on friendly terms as neighbours and fellow-subjects. It is, however, not necessary for me to go further into the particular facts of this case, because, as the learned Chief Justice has pointed out, the question is a pure question of law, and in this view I am bound to hold that s. 295 of the Indian Penal Code does not cover the case, and that the convictions were therefore wrong in law. I may, however, add that the circumstances of the case require that such matters should be dealt with by municipal regulations for which ample provision is made by our law, and that the learned Government Pleader, Munshi *Ram Prasad*, who appeared on behalf of the Crown to support the convictions, has been unable to show me any section of the Indian Penal Code under which the facts proved in this case would constitute a criminal offence within the meaning of that Code (s. 40). But when I say this I wish to guard myself

against being understood to lay down any general rule as to whether acts done by Hindus or Muhammadans offensive to each other's religious feelings would not in certain circumstances constitute an offence under the Code.

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I agree in the order proposed by the learned Chief Justice (1).

Convictions set aside.

APPELLATE CIVIL

1888 *January* 3.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

IMDAD KHATUN AND OTHERS (PLAINTIFFS) v. BHAGIRATH (DEFENDANT.)*

Land-holder and tenant—Occupancy tenant—Trees, sale of—Such sale invalid—Act XII of 1881 (*N.-W. P. Rent Act*), *s.* 9.

The trees upon an occupancy holding, whether planted by the tenant himself or not, belong and attach to such holding, and, like it, are not susceptible of transfer by the tenant.

THE first three defendants in this case, Rupram, Jairam and Netram, were occupancy tenants of the plaintiffs, in respect of a plot of land No. 215, upon which there grew a number of mango and other trees. By deed of sale, dated the 20th March, 1884, they sold the trees only to the defendant Bhagirath, who subsequently sued for possession thereof, and, on the 19th May, 1885, obtained a decree on confession of judgment in execution of which he dispossessed them from the whole of the occupancy holding. The plaintiffs zamíndárs brought the present suit on the 27th May, 1885, in which they prayed for cancelment of the deed of sale of the 20th March, 1884, and for ejectment of the defendant-vendee.

The Court of first instance (Munsif of Kasganj) decreed the claim. On appeal by the defendant-vendee, the Subordinate Judge of Aligarh reversed the Munsif's decree and dismissed the suit. In the course of his judgment he observed :—"The next point is whether the vendors could sell the trees. The evidence satisfactorily

* Second Appeal No. 541 of 1886 from a decree of Babu Abinash Chandra Banerji, Subordinate Judge of Aligarh, dated the 16th December, 1885, reversing a decree of Babu Madan Mohun, Munsif of Kasganj, dated the 2nd July, 1885.

(1) The only other reported case in which it was necessary to consider the effect of s. 295 of the Penal Code is *Hakim* v. *Empress* (Panjáb Record, 1884, No. 27) in which it was held by Plowden and Burney, JJ., "that the word "object" as used in s. 295 of the Penal Code is not limited to inanimate objects, but is wide enough to include animate objects which are held sacred, as well as idols, relics, or the like."

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proves that the trees belonged to them. The vendors and their ancestors had planted the trees, and had always enjoyed their fruits and wood. As the trees were their property, they could sell them to the appellant. Under the rulings of the High Court in *Sardar Singh* v. *Madara* (1) and *Debi Prasad* v. *Har Dayal* (2) the plaintiffs zamíndárs are not entitled under the circumstances of this case to dispossess the defendant from the land or the trees. I hold that the appellant is entitled to remain in possession of the trees and the land under them, so long as he pays the zamíndárs the rent formerly paid by his vendors."

The plaintiffs appealed to the High Court.

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants.

Munshi *Ram Prasad* and Lala *Durga Charan*, for the respondent.

STRAIGHT and TYRRELL, JJ.—For the purpose of determining this appeal it must be taken to have been found as a fact that the first set of defendants are occupancy tenants of the land on which the trees stand, that such trees were planted by themselves or their ancestors, that only the trees were sold to the second defendant by the sale-deed of the 20th March, 1884, and that by the decree of the 19th May, 1885, obtained by him on confession of judgment against the first set of defendants, he has dispossessed them from their cultivatory holding. Now it has been ruled by this Court in *Jagrani Bibi* v. *Ganeshi* (3) that a suit for possession of trees is a suit for possession of land within s. 29 of Act IX of 1871, and this principle has been more or less recognised in the Full Bench ruling that standing timber is immoveable property—*Umed Ram* v. *Daulat Ram* (4)—by Mahmood, J., in *Deoki Nandan* v. *Dhian Singh* (5), and by another Full Bench in *Jugal* v. *Deoki Nandan* (6). It was also held by Pearson and Oldfield, JJ., in *Ajudhia Nath* v. *Sital* (7), followed by Straight and Tyrrell, JJ. in *Ram Narain* v. *Madho* (8) that an occupancy tenant can only make a valid hypothecation of the trees held by him for the term of his tenancy.

(1) Weekly Notes, 1883, p. 2.
(2) I. L. R., 7 All. 691.
(3) I. L. R., 3 All. 435.
(4) I. L. R., 5 All. 564.
(5) I. L. R., 6 All. 471.
(6) I. L. R., 9 All. 88.
(7) I. L. R., 3 All. 567
(8) Weekly Notes, 1883, p. 100.

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With his ejectment from the land and the determination of his tenancy such an hypothecation ceases to be enforcible. Again in *Jhagaru* v. *Shamshere Khan* (1) it was held that a tenant who while cultivating land had planted trees thereon was not entitled, after he had ceased to cultivate it, to sue for possession of the trees; and in *Ram Baran Ram* v. *Salig Ram Singh* (2) the same principle was recognised. Nor is there anything inconsistent with this view in a decision of this Bench as constituted in *Kasim Mian* v. *Banda Husain* (3). We think, upon a review of all these authorities, that the trees on an occupancy holding, even whether planted by the tenant himself or not, belong and attach to such occupancy holding, and like it are not susceptible of transfer by the occupancy holder: indeed this is what we take it to have been laid down by the Full Bench in *Jugal* v. *Deoki Nandan* (4). To recognise such a sale as that which is the subject of the present suit would be to sanction a transfer by an occupancy-tenant who on the facts stated here has in fact been ousted. We do not lose sight of the fact that by local custom having the force of law an occupancy tenant may have a saleable interest in the timber, fruit, and loppings of trees planted by him, but no such custom is pleaded or proved in the present case, and the fact remains that the first set of defendants have sold something to the defendant No. 2, which, as a part of their occupancy holding, they are by law forbidden from transferring. We think therefore that the plaintiffs were entitled to have the sale-deed of the 20th March, 1884 avoided, to eject the defendant No. 2 from their land, and to have their proprietary possession of it restored. We accordingly decree the appeal with costs, and, reversing the decree of the Subordinate Judge, we direct that a decree be prepared declaring the above reliefs in favour of the plaintiffs with costs against all the defendants.

IMDAD KHATUN

Appeal allowed.

(1) Weekly Notes, 1881, p. 20.
(2) I. L. R., 2 All. 896.
(3) I. R. R., 5 All. 416.
(4) I. L. R., 9 All. 88.

1887
November 4.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

LACHMAN PRASAD (DEFENDANTS) *v.* JAMNA PRASAD AND OTHERS (PLAINTIFFS). *

Practice—Remand—Power of appellate Court to deal with whole appeal after return of findings—Customary easement—Privacy.

In a second appeal by the defendant, in which the plaintiff filed objections to the decree under s. 561 of the Civil Procedure Code, the High Court, without giving judgment on the appeal, stated (giving reasons) the opinion that the appellant would be entitled to succeed, and at the same time remitted an issue under s. 566 of the Code with reference to the plaintiff's objections. At that time the appeal was apparently not argued out, and the true meaning of the facts as found was obviously not present to the mind of the Court.

Held that upon the return of the findings on remand the Court could not treat the appeal as already decided and the objections the sole matter for consideration, but must consider both appeal and objections and decide the whole case.

Held, however, that where Judges have heard arguments on some of the issues and have expressed their views thereon and have remitted another issue or issues under s. 566, they are not bound, on the return of findings, to hear the case *de novo*, but may confine counsel to argument upon the findings.

Case in which it was found that the plaintiff was by local custom entitled to an easement of privacy, and in which the Court granted a mandatory order compelling the defendant to permanantly close the door or window complained of.

THE plaintiffs and the defendant in this case were the owners of adjoining houses in mohulla Nawabganj in the city of Cawnpore. The suit was brought for the removal of a door or window opened by the defendant in his western wall contiguous to the plaintiffs' house and alleged to invade their privacy; of a drain constructed by the defendant upon the same side of his house, the water from which flowed or dropped upon the plaintiffs' property; a *chajja*, or cornice in the same wall, and another *chajja* on the northern wall with a spout from which water fell upon a public thoroughfare used by the plaintiffs. The plea of the defendant was, in substance, that the drains and cornices complained of had existed for a long time, that no special damage to the plaintiffs from the drain on the north wall had been shown, and that the door or window on the western wall occupied a place where an aperture had for a long time existed without any complaint being made.

* Second Appeal No. 1517 of 1885 from a decree of Maulvi Syed Farid-ud-din, Subordinate Judge of Cawnpore, dated the 16th May, 1885, confirming a decree of Babu Bepin Behari Mukerji, Munsif of Cawnpore, dated the 18th September, 1884.

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The Court of first instance (Munsif of Cawnpore) decreed the claim, except in regard to the door or window and the drain on the northern side. Upon the issue as to the door, the Court observed :— "This point is very clear. It has been repeatedly held by the honorable High Court that a suit cannot be maintained to oblige the defendant to close doors recently opened in his house on the ground that they overlook the zenana of the plaintiff—*vide Mahomed Abdur Rahim* v. *Birju Sahu* (1), *Sheikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (2), and *Jogul Lal* v. *Musammat Jasoda Bebee* (3). This issue is accordingly decided against the plaintiffs." In regard to the issue as to the drain on the northern side, the Court held that the plaintiffs could not succeed, having failed to prove special damage, and referred to *Karim Bakhsh* v. *Budha* (4).

From the Munsif's decree the defendant appealed to the Subordinate Judge of Cawnpore, the plaintiffs at the same time filing objections to so much of the decree as was adverse to them. The Subordinate Judge concurred with the Munsif on all points. Upon the issue as to the door he said :—"I hold that although the door affects the privacy of the plaintiffs' house, yet as the defendant has set it up in his own wall, the plaintiffs have no right to have it closed. The remedy is in the hands of the plaintiffs. They can raise their wall so high that the door may not affect their privacy."

The defendant appealed to the High Court. The plaintiffs filed objections under s. 561 of the Civil Procedure Code with regard to the door or window and the northern drain.

On the 25th May, 1886, Oldfield and Mahmood, JJ., remitted an issue to the lower appellate Court for a finding as to how and to what extent the door or window affected the privacy of the plaintiffs. In his finding the Subordinate Judge said that the window in dispute overlooked the whole of the plaintiffs' house, and in particular those portions of the house which were reserved for females. Upon the return of this finding, the defendant filed objections under s. 567 of the Civil Procedure Code to the effect that the plaintiffs were not entitled to restrain him from opening and using his window on the ground of interference with their privacy, in the absence of proof of twenty years' uninterrupted user.

(1) 5 B. L. R. 676.
(2) 6 B. L. R. App. 76.
(3) N.-W. P. H. C. Rep., 1870, p. 311.
(4) I. L. R. 1 All. 249.

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On the 11th January, 1887, the following order was passed by Oldfield and Brodhurst, JJ.—

"We are of opinion that the appeal on behalf of the appellant must succeed in respect of the *chajja* and *kasi* made by him on the west wall of his house. The only ground on which the Court below ordered their removal is that they are recently made, but they are not shown to interfere with any right of the plaintiffs so that the latter can insist on their removal.

"Dealing with the objections filed by plaintiffs, we are of opinion that they have no force in respect of the complaint as to the drain defendant has made on his north wall.

"There is, however, the objection that the window and door have interfered with the privacy of the plaintiffs and overlook apartments kept for the occupation of the female members of their family, and the Court below has found that this is so in fact. We think it desirable that an issue be tried whether by local custom there is any right of easement by which the plaintiffs have a right to have the privacy of their apartments maintained by the removal of the door and window. The case is remanded, and ten days will be allowed for objections on return of the finding."

The Subordinate Judge's finding upon this issue was that the existence in the mohalla where the parties lived of a customary easement of privacy was proved. Upon the return of the finding, the defendant objected, under s. 567 of the Civil Procedure Code, that "no custom has been established in law." The case came on for hearing before Edge, C.J., and Brodhurst, J., on the 4th November, 1887.

Kunwar *Shivanath Sinha* and Pandit *Sundar Lal*, for the appellant.

Mr. *Amiruddin*, for the respondents.

EDGE, C.J.—In this case the defendant appealed and the plaintiffs filed objections. The case came on for hearing first before my brother Mahmood and Mr. Justice Oldfield, by whom an order of remand was passed with regard to the issue arising on the objections. On the return of the remand the case came on before my brother Brodhurst and Mr. Justice Oldfield on the 11th January

last. On that occasion they expressed an opinion as to the merits of the appeal. They did not give judgment on the appeal, but merely stated that the appellant would be entitled to succeed, giving certain reasons for that view. It appears to me that the appeal can have hardly been argued out before those Judges on the 11th January, as it is obvious that the true meaning of the facts as found was not present to their minds. However, on this occasion we have had the opportunity of hearing Mr. *Amiruddin*, who has taken care that we shall not overlook the findings. On the 11th January a further remand arising out of the objections originally taken was ordered. The return is now before us. Mr. *Amiruddin* contends that we have got to decide the whole case, and that we are not entitled to treat the expressions of the Judges on the 11th January as a judgment on the appeal. He has contended that the determination of an appeal when there has been a remand must be on a hearing of the appeal, that is, on a hearing of the whole case, and that this applies equally to an appeal in which there are objections as to an appeal in which there are none. I confess I thought at one part of the argument that we might treat the appeal as already decided and the questions arising on the objections the sole matter for our consideration. The practical difficulty which would arise from separating the appeal and the objections and treating the appeal as having been decided on the 11th of January last leads me to think that Mr. *Amiruddin's* argument is well founded. A difficulty would arise under s. 579 of the Code of Civil Procedure. That section provides that the decree of the appellate Court shall bear the date on which the judgment was pronounced, and the decree must be signed by the Judge or Judges who passed it. If Pandit *Sundar Lal's* contention were correct, there would be here two decrees, one of the 11th January of this year, the other a decree of to-day's date. If his contention is correct, we could not adopt the decree of 11th January as our own, as it would not be the decree of this Bench as constituted. I therefore come to the conclusion that the question which has been raised by the appellant and the objections raised by the respondents are to be considered by us. From my ruling on this point it must not be inferred that where Judges have heard arguments on some of the issues and have come to or

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expressed their views on those issues and have remanded another issue or issues under s. 566, the same Judges should be bound to hear on the return to the remand the case *de novo*. In such a case I for one would confine counsel to the findings on remand, which, of course, I had not had an opportunity of considering before. The defendant in his appeal asks to have set aside that part of the decree which interferes with the *chajja* and drain he had made. It is found that no *chajja* or drain existed previous to the time of the erection of the additional building which the defendant has erected. The *chajja* extended an appreciable distance over the plaintiffs' land. It is obvious that if the plaintiffs were not entitled to a decree with regard to the *chajja* and drain, the defendant might in course of time acquire an easement which might seriously interfere with the enjoyment by the plaintiff of his land. I am of opinion that the appeal should be dismissed with costs. As to the objections, the findings on remand show that the plaintiff is entitled to have his right of privacy observed, and to have a mandatory order to compel the appellant to permanently close the door or window complained of. In this respect the decree of the Court below will be varied. I am of opinion that the objections should be allowed with costs.

BRODHURST, J.—On further consideration of this second appeal, I no longer hold the opinion that is expressed in the order of remand dated the 11th January last, and I concur in the judgment that has been delivered by the learned Chief Justice.

Decree modified.

P. C.
J. C.
1887
December 3.

PRIVY COUNCIL.

ZAIN-UL-ABDIN KHAN v. MUHAMMAD ASGHAR ALI KHAN AND OTHERS.

[On appeal from the High Court for the North-Western Provinces.]

Sale in execution of decree—Effect of reversal of decree upon sale in execution—Sale to bonâ fide purchaser, not a party to the decree, distinguished from sale to decree-holder.

A sale, having duly taken place in execution of a decree in force at the time, cannot afterwards be set aside as against a *bona fide* purchaser, not a party to the

Present: Lord FITZGERALD, SIR B. PEACOCK, and SIR R. COUCH.

decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an appellate Court.

A suit was brought by a judgment-debtor to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bonâ fide* purchasers at other sales, under the same decree, who were no parties to it.

Held that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers, the suit must be dismissed.

Appeal from two decrees (11th June, 1883) of the High Court, reversing a decree (16th March, 1882) of the Subordinate Judge of Moradabad.

The question raised in this appeal was whether or not several auction sales of property formerly belonging to the appellant, who was judgment-debtor under the decree in satisfaction of which the sales took place, were to be set aside, on the ground that this decree had been, subsequently to the sales, so far modified by an appellate Court as to make what had been realized at a prior sale of the appellant's property sufficient to cover the amount finally decreed.

The sales were in execution of an *ex parte* decree (8th April, 1874) obtained by three of the defendants in the present suit for possession of shares in zamindari lands and houses, and for mesne profits and payment of a dower-debt, also for money due on a promissory note, the whole aggregating in value more than a lakh of rupees.

An appeal having been rejected by the High Court (26th August, 1875) on the ground that there could be no appeal from such an *ex parte* decree, an appeal to Her Majesty in Council (1) (22nd November, 1878) resulted in a remand, followed by a decree of the High Court (1st March, 1880) disallowing part of the claim, on grounds, thus expressed in the judgment, having reference to jurisdiction, which affected the right to recover the dower-debt, and upon the promissory note:

(1) *Sahibzada Zein-ul-abdin Khan* v. *Sahibzada Ahmad Raza Khan*, L. R. 5 I. A. 238.

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"The cause of action cannot be held to have arisen in the district of Moradabad, for the lady was a resident of Jaipur and died there, and the plaintiffs are residents of the foreign State of Jaipur, and the defendant dwells in the foreign State of Jaipur, and has no connection with Moradabad.

"Equally, the Court will not have jurisdiction to try the claim for the dower-debt: this item is claimed as part of the assets left by the lady and divisible among the heirs. As already stated, the lady died at Jaipur and had no connection with the district of Moradabad, and her marriage, and presumably the contract for dower, took place at Rampur."

By the decree (1st March, 1880) which followed this judgment, the former decree (8th April, 1874) was confirmed as to the estates in land and as to the mesne profits for Rs. 3,746 only, with Rs. 4,908 for costs.

Meanwhile, the holders of the decree of 1874 had, in that year, obtained orders for sale in execution of it and brought to sale some of the judgment-debtor's property.

The first sale was on the 17th November, 1874, and comprised a house known as Diwan Kaunal's in Moradabad, for Rs. 5,050, the purchaser being Ashgar Ali Khan, one of the present respondents.

This property was not included in the present claim, the plaintiff explaining that this sale might stand good as satisfying what was due under the decree of the 1st March, 1880. Of those sales which the present suit (22nd February, 1881) sought to have set aside, the first was a sale (21st November, 1874) of twelve and a half biswas owned by the plaintiff, appellant, in mauza Alata for Rs. 8,575. The second was a sale (20th November, 1875) of his right, title, and interest in other villages which had realized Rs. 18,900 and Rs. 12,000. Another was a sale (15th November, 1876) of the Bank Kothi in Meerut cantonment. At these sales the decree-holders had purchased some of the property, and they, or purchasers from them, were originally the only defendants. But by an order of the Court of first instance (17th January, 1882) the respondents, Har Sarup, Parshadi Lal, and Jeo Ram, purchasers

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at the auction-sales, who were not parties to the decree of 8th April, 1874, were made defendants.

Issues having raised the question (among others) whether the sales could be set aside on the ground of the subsequent modification of the decree, the Subordinate Judge held that the plaintiff was entitled to have them set aside both as against the decree-holders who had brought the property to sale in satisfaction of their decree and had purchased at the sales, and as against the purchasers who were no parties to the decree.

The latter only were the appellants in the appeal to the High Court which followed, and a Divisional Bench (Straight and Oldfield, JJ.) reversed the above judgment as against them, on the ground that the sales, as against *bonâ fide* purchasers, not parties to the decree subsequently modified, were not rendered invalid by the modification taking place (1).

On this appeal,

Mr. *T. H Cowie, Q C.*, and Mr. *C. W. Arathoon*, appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *W. A. Raikes* appeared for the respondents.

For the appellants it was argued that the judgment of the first Court had been so far correct that all the sales subsequent to that which had realized enough to satisfy the decree as finally made should be set aside; and that the modification of the decree of the 8th April, 1874, which had taken place on the ground of the absence of jurisdiction, showed that sales realizing amounts in excess of what was ultimately allowed by the decree of 1st March, 1880 were unauthorized.

Reference was made to *Jadunath Kundu Chowdhry* v. *Brajanath Kundu* (2), *Kanhaye Singh* v. *Oomadhar Bhatt* (3), *Abdool Hye* v. *Nawab Raj* (4).

Counsel for the respondents were not called upon.

SIR B. PEACOCK gave their Lordships' judgment.

SIR B. PEACOCK.—In this case the plaintiff sued several defendants, claiming to set aside certain auction sales which had

(1) Weekly Notes, 1883, p. 158.
(2) 68 B. L. R., Appendix 90.
(3) 21 W. R. 291.
(4) B. L. R. Sup. Vol. 911, (F. B.)

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taken place under a decree of the Subordinate Judge of Moradabad, and for an order that the plaintiffs be put into absolute possession of the properties which were sold and are mentioned in the schedule to the plaint. In the schedule the properties and the purchasers thereof are separately described, and the action may be treated not as a joint action as regards all the property, but as an action against the several defendants as regards the properties of which they were severally purchasers.

Some of the defendants were the decree-holders, and some were persons who came in under them; but all the defendants who are in that position may for the purpose of this judgment be classed under the head of the decree-holders. Others of the defendants were not decree-holders, but merely purchasers under the execution and strangers to the decree upon which the execution issued. The circumstances are peculiar. The plaintiffs in the suit in which the execution was issued sued the present appellant in the Court of the Subordinate Judge of Moradabad to recover certain landed property situate in that district, and also mesne profits in respect of that property. They also sued for a large amount in respect of promissory notes which were alleged to be due from the present appellant to the plaintiffs in that suit, and a large amount alleged to be due from the appellant as dower to their mother, whom they represented. The defendant in that suit—the present appellant—objected that there was no jurisdiction on the part of the Subordinate Judge to try the suit, inasmuch as he, the then defendant, was not a resident in the district of Moradabad, but a resident in foreign territory, namely, Jaipur. But the Subordinate Judge decided that he had jurisdiction and gave a decree against him, not only for the lands which were situate in the district, and the mesne profits of those lands, but also for the amount which was claimed to be due on the promissory notes and on account of the dower.

That case was appealed to the High Court, but that Court dismissed the appeal upon the ground that the case was not appealable. An appeal was then preferred to Her Majesty in Council against that decision of the High Court, and Her Majesty in Council reversed the decision of the High Court and remanded

the case to be tried upon the merits. The High Court, when they tried the case upon the merits, reversed the decision of the Subordinate Judge as regards the amount decreed by the Subordinate Judge in respect of the dower and of the promissory notes, but affirmed his judgment as to the land which was situate within his jurisdiction, and the mesne profits in respect of that land. But before the judgment of the Privy Council, and before the decree of the High Court which reversed a part of the original judgment of the Subordinate Judge, the plaintiffs in that suit, who are now some of the defendants, executed their decree, and several sales took place under that execution. Under the first sale a certain amount was realised which would have been sufficient to cover the amount finally allowed by the decree of the High Court upon appeal. A second sale took place under which one of the defendants, Asghar Ali, purchased *bonâ fide*, he not being a party to the original decree.

The plaintiff brought his suit on the 22nd of February, 1881, not only against the decree-holders who had purchased under the execution, but as against the *bonâ fide* purchaser who was no party to the decree.

Pending the suit certain other defendants were added, as appears at page 2 of the record. The entry on the record is as follows:—"According to the order dated 17th January, 1882, Har Sarup, Parshadi Lal, and Jiwa Ram, auction-purchasers, were joined as defendants." The three defendants who were then joined were no parties to the decree, so that there are two sets of defendants in the suit: the decree-holders who purchased under their own execution; Asghar Ali, who purchased a portion of the property of the plaintiff, being a *bonâ fide* purchaser and a stranger to the decree; and the three other defendants, who were alleged to be auction-purchasers under the decree and who were no parties to it.

The plaintiff claimed that "the auction sales of the disputed property detailed in the plaint, held on 20th November, 1874, 20th November, 1875, and 15th November, 1876, be declared null and void, and the sale deed in favour of Shaukat Husain Khan, dated 2nd November, 1880, so far as it appertains to the plaintiff's claim,

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be set aside." Thus he claimed to set aside all the auction sales, not only as against the decree-holders who had purchased, but as against *bonâ fide* purchasers who were no parties to the decree. Secondly, he claimed that "plaintiff be put in absolute possession of the undermentioned property of the value of Rs. 21,450 after dispossession of the defendants."

Amongst other issues, one was whether the auction sale and the purchase, having been made *bonâ fide*, could be invalidated or set aside by the modification of the decree, and whether the limitation law barred the claim.

It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bonâ fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order.

A great distinction has been made between the case of *bonâ fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves. In Bacon's Abridgment, Title "Error," it is laid down, citing old authorities, that "if a man recovers damages, and hath execution by *fieri facias*, and upon the *fieri facias* the sheriff sells to a stranger a term for years, and after the judgement is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold it by the command of the writ of *fieri facias*." There are decisions to a similar effect in the High Court at Calcutta. They are collected in a note in Broughton, in his book on the Code of Civil Procedure, fourth edition, note to s. 246, Act VIII of 1859. So in this case, those *bonâ fide* purchasers, who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale.

The Subordinate Judge held that the defendants were bound to restore the property; not only the decree-holders who had purchased, but the defendants who had purchased *bonâ fide*, not being

parties to the decree. In his judgment he says:—"The limitation period of one year has nothing to do with this case. The cause of action having accrued to plaintiff on the 1st March, 1880, the date when the decision was modified, and as he instituted the claim on 22nd February, 1881, it is on no account considered beyond time." Therefore he held that the suit was not barred, but that the plaintiff had a right to recover, not only as against the decree-holders, but as against the *bonâ fide* purchasers, who were no parties to the decree under which they purchased, and he decreed the plaintiff's suit. The defendant Asghar Ali and the three added defendants, none of whom was a party to the decree in execution of which the sales were effected, appealed to the High Court.

When the case came before the High Court they reversed that decision. They passed two decrees, one as regards the three appellants who were the added defendants, and the other as against Asghar Ali; but they are both in similar words. They said:—"Both appeals must be decreed with costs, and the decision of the Subordinate Judge being reversed, the plaintiff's claim will stand dismissed." According to the strict grammatical construction of the decrees the plaintiff's claim was dismissed, not only as regards the defendants who had appealed, but as regards the others who had not appealed. The decrees must, however, be construed as applicable only to the defendants who had appealed and whose appeals were decreed, and not to the defendants who had not appealed, and who were not before the Court and had not objected to the decision of the Subordinate Judge.

Their Lordships therefore will humbly advise Her Majesty that the decrees of the High Court ought to be treated as decrees against the plaintiff only so far as his suit related to the defendants who had appealed to the Court, and that being so treated, they ought to be affirmed; and that the decree of the Subordinate Judge should be reversed so far only as it related to the plaintiff's claim against those defendants. Their Lordships also think that the appellant must pay the costs of the respondents in this appeal.

Their Lordships wish it to be distinctly understood that in affirming the decrees of the High Court they treat them merely as

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decrees in favour of the defendants who were appellants to the High Court.

Appeal dismissed.

Solicitors for the appellant—Messrs. *T. L. Wilson and Co.*

Solicitors for the respondents—Messrs. *Oelme and Summerhays.*

APPELLATE CRIMINAL.

1887
December 19.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* POHP SINGH AND ANOTHER.

Criminal Procedure Code, s. 509—Deposition of medical witness taken by Magistrate tendered at sessions trial—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence—Act I of 1872 *(Evidence Act), s. 80.*

Although all depositions of witnesses in criminal cases should be taken and attested in the presence of the accused, and a few apt words should be used on the face of the deposition to make it apparent that this has been done, there is no provision of the law which makes the attestation of the deposition by the Court in the presence of the accused obligatory.

S. 80 of the Evidence Act therefore does not warrant the presumption that the deposition of a medical witness taken by a committing Magistrate has been taken and attested in the accused's presence, so as to make such deposition admissible in evidence at the trial before the Court of Session under s. 509 of the Criminal Procedure Code. *Queen-Empress v. Riding* (1) referred to.

The facts of this case are sufficiently stated in the judgment of Edge, C.J.

Mr. *C. Dillon*, for the appellants.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

EDGE, C.J.—This is an appeal by Pohp Singh and Jaswant Singh, who were convicted by the Sessions Judge of Agra, on the 12th November last, of the murder of Musammat Khamani, and were by him sentenced to death. The principal evidence for the prosecution was that of Suraj Pal, a Brahman of Dhanola, a Chamar, and of Pancham Singh, a Thakur. Those three witnesses deposed to having seen the prisoners kicking the deceased woman, who was apparently fifty-five years of age, and to having seen the woman, after she had been kicked and rendered insensible, dragged or carried by the prisoners to a well and thrown into it by them.

(1) I. L. R., 9 All. 720.

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The circumstances which led up to the commission of the crime, of which I believe the prisoners to be guilty, were that the deceased woman had held portions of some land as mortgagee, that a Raja had put the prisoners in possession of that land, and that on the day in question the prisoners, or one of them, was ploughing the land adversely to the rights of the deceased woman; that she objected to their doing so and made an outcry, upon which Suraj Pal came up, when he was assaulted by the two prisoners, Jaswant Singh striking him on the arm with a *lathi* and Pohp Singh striking him on the head. The old woman came to his assistance, when she was kicked in the manner described by those witnesses to whom I have referred. It appears to me that the story those witnesses told is the true one, and that the deceased woman, after she had been rendered insensible by the violence of the prisoners, was thrown into the well by them with the result that she died. For the defence there were several witnesses called. The first three of those, namely, Ganga Prasad, Gajraj Singh, and Jarra Singh, know nothing about the transaction. The fourth witness, Than Singh, says that the old woman, upon seeing Suraj Pal assaulted, went to the well and threw herself into it and that Ganga Prasad's wife accompanied the old woman to the well. We are told that Ganga Prasad's wife was Musammat Daryayi, who is mentioned in the petition of Pohp Singh; she was not called as a witness on either side. The next witness, Ganesh Prasad, says that after the fight Suraj Pal and Pohp Singh went off to the village, leaving the woman sitting in her field, and that she did not fall into the well in his presence. The evidence of these two witnesses is inconsistent, and I must say I do not believe it. The next witness, Sarawan Singh, says that he heard that Musammat Khamani fell into the well, but he did not know how; in cross examination he said: "I saw Khamani falling into the well." Immediately afterwards he said that he heard she had, and that no one was near her at the time. It is obvious that this witness was not telling the truth. Those last three witnesses are the witnesses for the defendant, who appear to have been, according to their evidence, either at or near the place where the occurrence took place at the time. On behalf of Jaswant Singh an *alibi* was set up, which was supported by Khushal, Surat, and Har

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Prasad, and also Ganesh Prasad, to whom I have already referred. I believe that Jaswant was present on the occasion in question, and that he was one of the two men who kicked the deceased and threw her into the well, and I do not believe the *alibi*. On the 14th July, the day on which this took place, Suraj Pal made a complaint at the thana. He then, according to the evidence of Ram Dayal, Sub-Inspector of Jeitpura, charged these two prisoners with having beaten the woman and thrown her into the well. I thoroughly agree with the comments of the Sessions Judge on the conduct of Ram Dayal, and in my opinion the attention of the Government should be called to his conduct in this case. I have not a shadow of doubt in my mind that these two prisoners brought about that woman's death under circumstances which render them liable to be convicted of murder. I think they were properly convicted, and I am of opinion that this appeal should be dismissed and the sentences confirmed.

In the course of the argument in this case the deposition of Dr. A. Hilson, Civil Surgeon of Agra, was commented on by the counsel for the appellants, and that deposition, as printed in the paper book, was very properly made use of by that counsel in support of his contention that the Doctor's evidence was consistent with the defence of suicide, and he also contended that the deposition was at variance with the depositions of Suraj Pal and the other witnesses for the prosecution. I do not see, myself, that it is at variance with the evidence. However, the reason for which I have referred to the deposition has to do with the form in which that deposition has come before us. On examining the record we find two documents bearing the signature of Saiyad Muhammad Mohsin, who was in fact the Deputy Magistrate who committed the prisoners for trial. Now, one of those is in the vernacular and appears to be, as far as we can judge, a note or translation of the evidence of Dr. Hilson. It apparently bears the signature of Mr. Saiyad Muhammad Mohsin, with the additional letters "D. C.," which, I suppose, means Deputy Collector. Below the signature are the figures 20-9-87, and below them some hieroglyphics. That document does not purport to have been the deposition of Dr. Hilson taken and attested by the Magistrate in the presence of the accused. The concluding paragraph in that document, as

translated, reads thus: "The injury could be caused by a fall from a considerable height." The other document to which I refer bears the heading "Deposition of Dr. A. Hilson, Civil Surgeon of Agra, on S. A." That heading is written in black ink. Beneath that heading there is written in blue ink what I suppose was the evidence of Dr. Hilson. This document is described in the list of documents as the deposition of Dr. Hilson. It purports to bear the signature of A. Hilson, M.D., Civil Surgeon, and the signature of Saiyad Muhammad Mohsin. The body of the document is not in Mr. Mohsin's writing. Whether the name A. Hilson at the foot of the document was written by Dr. Hilson, or by the writer of the body of the document, I am unable to tell. It is quite obvious at any rate that the letters "M.D." and the words "Civil Surgeon" in blue ink at the foot of the document are in the same hand-writing as that at the head of the document in black ink. Now the last paragraph of this document as it stood originally read as follows: "The injury might have been caused by a fall from a considerable height." As it now appears, that paragraph reads thus: "The injury had been caused by a fall from a considerable height." The latter is the reading which is relied on for the defence—a reading which is consistent with the sentence immediately preceding it, as well as with the reading of the vernacular document to which I have just referred. How, or when, or by whom, this alteration was made there is nothing to show. That alteration is not vouched for or initialled in any way. If it be the fact that this document in English is a translation of the original deposition, the heading is misleading; the heading would lead one to infer that it was the original deposition. Whichever it is, there is nothing to show that it was taken or attested by the Magistrate in the presence of the accused. If either of these had been documents essential as evidence for the prosecution in this case, I should have declined to treat them as evidence against the accused under s. 509 of the Criminal Procedure Code of 1882. That section is as follows: "The deposition of a Civil Surgeon or other medical witness taken and attested by a Magistrate in the presence of the accused may be given in evidence in any inquiry, trial, or other proceeding under this Code, although the deponent is not called as a witness. The Court may, if it thinks fit, summon

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and examine such deponent as to the subject-matter of his deposition." As I have said, there is nothing on the face of either of these documents to show that either was taken or attested by a Magistrate in the presence of the accused. In the case *Queen-Empress* v. *Riding* (1) I rejected a document which was tendered as evidence under s. 509. In that case I was asked to presume that it had been taken and attested in the presence of the accused, and was pressed with s. 114, illustration (*e*), of the Evidence Act. There is a Reporter's note appended to that case. I infer that that note originated in some one having considered that s. 80 of the Evidence Act would apply. I may say that, in my judgment, all depositions of witnesses in criminal cases should be taken and attested by the Magistrate in presence of the accused; but I am not aware of any provisions in these Codes which make the attestation of the deposition by the Magistrate in the presence of the accused obligatory. Unless it is made obligatory by the Codes that such attestation should take place in the presence of the accused, I fail to see how s. 80 of the Evidence Act can be held to apply by any who takes the trouble to read that section with ordinary care. The document may be genuine, and still it may not have been attested by the Magistrate in the presence of the accused. There is no statement on the face of the document as to the circumstances under which the deposition, if it was one, was taken, and as to the concluding words of s. 80, if there is no obligation imposed upon the Magistrate by the Code to attest the deposition in the presence of the accused, the evidence or statement might have been duly taken, although not attested by the Magistrate in the presence of the accused. I may go further and say that in this case there is nothing to show that what I assume for the moment to be the deposition of Dr. Hilson was either taken or attested by the Magistrate in the presence of the accused. S. 509 of the Criminal Procedure Code does not enact that a deposition of a Surgeon shall be taken and attested by the Magistrate in the presence of the accused. What it does provide is that a deposition of a Surgeon, if so taken and attested, may be put in evidence. A Magistrate should take and attest a deposition in the presence of the accused, and should also, by the use of a few apt words on the face of the

(1) I. L. R., 9 All. 720.

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deposition, make it apparent that he has done so. The second document, to which I have already referred, affords a good example of the danger in the criminal case, involving the life of an accused, of making any such presumption as that which I was asked to make in the case of *Queen-Empress* v. *Riding* (1). The file in this case will be returned under seal to the Sessions Judge of Agra, and he will be requested to enquire into the origin of these two documents, and when and by whom they were signed, and when and by whom the alteration in that which is in English was made, and report to this Court accordingly.

TYRRELL, J.—I entirely concur in the dismissal of this appeal and in directing the sentence to be carried out, and I also concur with what has been said by the learned Chief Justice in respect of the deposition of Dr. Hilson, and I fully adopt the ruling of the learned Chief Justice in *Queen-Empress* v. *Riding* (1) and his remarks on the same subject which have been made in the present case.

APPELLATE CIVIL.

1888
January 4.

Before Mr. Justice Mahmood.

DAMODAR DAS AND ANOTHER (DECREE-HOLDERS) v. BUDH KUAR AND OTHERS (JUDGMENT-DEBTORS).*

Costs—Mortgage—Decree for foreclosure—Order absolute for foreclosure—Mortgagee obtaining possession—Subsequent application by mortgagee to execute order for costs—Civil Procedure Code, s. 220—Act IV of 1882 (Transfer of Property Act), ss. 86, 87, 94.

A decree for foreclosure containing a distinct and separate order for costs was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs.

Held that the costs awarded could not be considered part of the money due upon the mortgage, and, as such, superseded by the order absolute and the mortgagee's possession thereunder, and the application must, therefore, be allowed. *Rutnessur Sein* v. *Jusoda* (2) referred to.

THE appellants in this case obtained a decree for foreclosure against the respondents on the 9th September, 1886, and it was

* First Appeal No. 187 of 1887 from an order of Maulvi Mohamed Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 27th May, 1887.

(1) I. L. R., 9 All. 720. (2) I. L. R., 14 Calc. 185.

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provided in the decree that in default of payment of the decretal sum due on the mortgage by conditional sale on or before the 9th March, 1887, the defendants should be absolutely debarred of all right to redeem the property. The decree then went on to say:—"And this also is ordered, that the defendants do pay to the plaintiffs Rs. 401-6 in respect of the costs of this Court which have been incurred by them." This order was apparently passed under s. 220 of the Civil Procedure Code.

The defendants failed to pay the decretal money within the prescribed period, and accordingly, in execution of the decree, the decree-holders obtained possession of the mortgaged property. Subsequently, they made an application on the 10th May, 1887, in which they claimed to recover the sum awarded to them for costs under the decree of the 9th September, 1886.

The Court executing the decree (Subordinate Judge of Mainpuri) gave judgment as follows, rejecting the application.

"Certainly no costs will be allowed, because s. 87 of Act IV of 1882 says that if such payment is not so made, the plaintiff may apply to the Court for an order that the defendant be debarred absolutely of all rights to redeem the mortgaged property, and the Court shall then pass such order." The defendants failed to make payment, and the plaintiffs, having taken proceedings under the said clause, obtained possession of the foreclosed property. The plaintiffs have, therefore, no right to recover costs, because two cases are contemplated in the section; one is that the defendants pay the judgment-debt together with costs, and the other is that the plaintiffs obtain possession. In the second case, it does not at all appear from the section that the decree-holder shall, notwithstanding delivery of possession, be entitled to costs. My order in the regular suit was also to the following effect:—"The judgment-debtors either pay the whole amount with costs or be debarred of all rights to redeem. The forfeiture of the rights of redemption is the result of not fully carrying out the condition of the first case, including costs. That case is different in which the Court awards costs personally against the judgment-debtor who continues personally responsible. But when such is not the case, and a general order is made under s. 87, the third case does not hold

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good, that either the right of redemption is barred or payment should be made. There is no case in which the right of redemption is barred for default in paying the principal and interest, and yet costs remain due separately."

The decree-holders appealed to the High Court.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the appellants.

The respondents were not represented.

MAHMOOD, J. (after stating the facts and the conclusions of the lower Court, continued) :—I am unable to accept this view of the law. The decree in the case appears to have been framed in the terms of ss. 86 and 87 of the Transfer of Property Act (IV of 1882) and of s. 94 of the same enactment. It is unnecessary for me to go into the exact effect of these various sections in this case, because the decree of the 9th September, 1886, which I am called upon to interpret, appears to me explicit in terms as to costs.

It is one thing to say that by reason of the money due upon the *bai bil-wafa* mortgage the mortgage has ceased to be redeemable, and it is another thing to say that the order as to costs contained in the decree forms a part and parcel of the money due upon such a mortgage. In a suit for foreclosure, the plaintiff may be claiming neither more nor less than what is really and rightly due upon the mortgage, and the defendant in resisting the suit would, in order to escape costs, be entitled to show that there was no real dispute or that he had been improperly impleaded. But in a case like the present, in which the suit ended in the decree of the 9th September, 1886, the defendants appear to have disputed the rights of foreclosure and to have failed in such defence. The order as to costs in this case has been dealt with as a separate part of the decree unaffected by the question whether or not the defendants-mortgagors paid the amount due on the *bai-bil-wafa* mortgage. Such, I think, is the general effect of the view adopted by the learned Judges of the Calcutta High Court in *Rutnessur Sein* v. *Jusoda* (1), and in the present case it seems to me that the decree itself is explicit and the order relating to costs should have been allowed to be executed by the lower Courts.

(1) I. L. R. 14 Calc. 185.

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For these reasons I decree the appeal, and as the amount due for costs is a matter relating to accounts, the proper course is to set aside the order of the lower appellate Court and remand the case under s. 562 of the Civil Procedure Code to be dealt with according to law as stated in this judgment. I order accordingly. Costs will abide the result.

Cause remanded.

1888
January 9.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

ARJUN SINGH (OPPOSITE PARTY) *v.* SARFARAZ SINGH (PETITIONER).*

Pre-emption—Wajib-ul-arz—Rival suits—Decree not to allow either claimant to pre-empt part only of the property over which he has a pre-emptive right.

Where two rival pre-emptors, each having an equal right to claim pre-emption under a *wajib-ul-arz*, bring suits to enforce their rights, in the absence of anything in the *wajib-ul-arz* to the contrary, the rule of Muhammadan law must be observed, and however the property may be divided by the decree of the Court between the successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on the default of one by the other, or that neither of them should obtain any interest in the property in respect of which the suits were brought.

In two rival suits for pre-emption, the Court gave one claimant a decree in respect of a three annas share, and the other a decree in respect of a two annas six pies share of certain property, each decree being conditional on payment of the price within thirty days. The Court further directed that in case of either pre-emptor making default of payment within the thirty days, the other should be entitled to pre-empt his share on payment of the price thereof within fifteen days of such default. Both pre-emptors made default of payment within the thirty days. One of them, within the further period of fifteen days, paid into Court the price of the share decreed in favour of the other and claimed to pre-empt such share.

Held (affirming the judgment of MAHMOOD, J.) that the claim was inadmissible, since to allow it would have the effect of defeating the rule of law that a pre-emptor must buy the whole and not part only of the property which he is entitled to pre-empt

THIS was an appeal under s. 10 of the Letters' Patent from a decision of Mahmood, J., sitting as a single Judge. The facts of the case are fully stated in the judgments of the Court.

Mr. *J. Simeon*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

MAHMOOD, J.—The facts of this case are these:—One Ram Kant Misr was the owner of a 5 annas 6 pies share, which he sold under a sale-deed dated Pus badi 12, 1290 fasli (1883) to Ganga

*Appeal No. 13 of 1887 under s. 10, Letters Patent.

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Mahton and Har Bakhsh Mahton. Upon this sale two pre-emptive suits were instituted, one by Arjun and the other by Sarfaraz. Both suits were decreed on the 16th August, 1884, which decrees were upheld in appeal on the 31st October, 1885. The effect of those decrees was that whilst the pre-emptor Arjun was held entitled to pre-empt a three annas share in lieu of Rs. 1,308-9-0, the rival pre-emptor Sarfaraz was held entitled to pre-empt the remaining 2 annas 6 pies share on payment of Rs. 1,090-7-0. But it was provided in both the decrees that in case of default of either of the pre-emptors to pay in the amount above specified within a period of thirty days, the other pre-emptor would be entitled to pre-empt the remaining portion of the share decreed to the other pre-emptor on payment of the price thereof within fifteen days of such default.

It is therefore clear that the decrees of Arjun and Sarfaraz related to the entire 5 annas 6 pies share, subject to the restriction therein contained as I have mentioned. Such decrees were in full accord with the rule which applies to decrees for pre-emption in cases of rival pre-emptors, as fully stated in the case of *Kashi Nath* v. *Mukhta Prasad* (1), which was approved in *Hulasi* v. *Sheo Prasad* (2). It is also clear that each decree awarded pre-emption in respect of the whole subject of sale. Nor can these decrees be understood to have infringed the fundamental rule of pre-emption, namely, that the bargain of sale cannot be split up with reference to the subject-matter of the sale. This latter proposition is the effect of the ruling in *Durga Prasad* v. *Munsi* (3) and the cases referred to therein.

What appears to have happened here is that neither Arjun nor Sarfaraz deposited their respective sums of money within the thirty days specified in their respective decrees. The present dispute, however, has arisen because Arjun, the present respondent, having lost the benefit of his decree, is seeking to obtain the benefit of the decree obtained by Sarfaraz by depositing within fifteen days from the date of the default the sum of Rs. 1,090-7-0 as the purchase-money of the 2 annas 6 pies share which had been decreed in favour of Sarfaraz, and in respect of which the decree provided

(1) I. L. R. 6 All. 370. (2) I. L. R. 6 All. 455.
(3) I. L. R. 6 All. 423.

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that Arjun, the rival pre-emptor, might enforce pre-emption on default of payment by Sarfaraz.

The Court of first instance held that the decree obtained by Sarfaraz could not be executed in this manner in favour of Arjun, who was judgment-debtor of that decree, and that such a partial execution of a pre-emption decree could not be allowed. Upon this ground that Court disallowed the application for execution, which, I may add, was opposed by Sarfaraz also, the holder of the decree under which Arjun claimed. The lower appellate Court, however, has reversed that order, and from that order this second appeal is preferred.

It seems to me clear that the lower appellate Court has misapprehended the case and the rule of law applicable to it It is admitted that in the decree obtained by Arjun, the vendor and the vendee as well as the rival pre-emptor Sarfaraz were defendants and became judgment-debtors when the claim was decreed. Similarly in the decree obtained by Sarfaraz the vendor and the vendee were defendants, as also Arjun, the rival pre-emptor. Now this being so, the decree of which the decree-holder could avail himself was the decree which he himself obtained, and not the decree which had been passed against him, whatever its terms may have been. The present respondent Arjun allowed his decree for pre-emption to lapse by reason of not having deposited Rs. 1,308-9, which that decree required him to do within thirty days, and that decree could not therefore be of any further use to him. Having thus foregone the benefit of his decree, I do not think he is entitled to execute the decree which Sarfaraz had obtained, simply because that decree, with reference to the other decree, allowed Arjun to pre-empt the remaining 2 annas 6 pies share within fifteen days of the default of payment of the purchase-money by Sarfaraz. The effect of the ruling of the lower appellate Court would be to split up the bargain of sale, because if Arjun could pre empt only the 2 annas 6 pies share as he is seeking to do here, the remaining 3 annas would still be left in the hands of the vendees. The view of the law taken by the lower appellate Court is erroneous, because it is opposed, as I have already said, to the very fundamental principles of the law of pre-emption. Mr. *Ram Prasad*, on behalf of the respondent, has

indeed argued that in dealing with this case as a Court executing the decree, I am bound by the terms of the decrees, and thus I am precluded from applying the general principles of pre-emption at this stage. As to this contention, it is enough to say that, in the first place, the decrees themselves have for their sole aim and end the exclusion of such a splitting up of the bargain of sale as would result from the order of the lower appellate Court, and in the next place that in interpreting those decrees I cannot disregard the general principles of the law of pre-emption.

I hold, therefore, that the respondent Arjun, by foregoing his own decree by default of payment, is precluded from availing himself of the decree obtained by the rival pre-emptor Sarfaraz. In this view of this case this appeal is decreed, and the order of the lower appellate Court being set aside, that of the Court of first instance is restored. The respondent will pay costs in all the Courts.

From this decree Arjun appealed under s. 10 of the Letters Patent.

Munshi *Ram Prasad*, for the appellant.

Mr. *J. Simeon*, for the respondent.

EDGE, C. J.—This appeal has arisen in the execution of a decree in a pre-emption suit. The share-holder in the village sold to a stranger, so far as is material, a 5 annas 6 pies share. Upon that Arjun Singh, the present appellant, brought his action for pre-emption of the whole share. Sarfaraz Singh, who was equally entitled with Arjun to pre-emption, brought his action claiming to pre-empt the whole. These two actions were tried together by the then Judge of Gorakhpur, and he dealt with them in this way: he passed a decree in Arjun Singh's favour in respect of 3 annas out of the 5 annas 6 pies on payment within thirty days of the date of the decree of Rs. 1,308-9-0, and in favour of Sarfaraz Singh in respect of the remaining 2 annas 6 pies on payment within a like period of Rs. 1,090-7-0, and by both of the decrees it was provided that in case of default on the part of either of the pre-emptors to pay the amount above specified within a period of thirty days, the other pre-emptor would be entitled

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to pre-empt the remaining portion of the share decreed to the other pre-emptor on payment of the price thereof within fifteen days of such default. What has taken place is this: the two pre-emptors made default of payment within thirty days. Arjun Singh after the expiration of thirty days, and within the further period of fifteen days, paid into the Court the Rs. 1,090-7-0, the pre-emption price decreed in respect of the 2½ annas share, and he now claims in execution to have possession of that 2½ annas share. It appears that by some arrangement to which Arjun Singh was no party, and which is not necessary for me to consider, Sarfaraz Singh, although he made default, got possession of the 2½ annas share. For the purposes of my judgment it is immaterial whether Sarfaraz Singh got possession of the 2½ annas share or not. The Subordinate Judge dismissed Arjun Singh's claim to have execution in respect of the 2½ annas share. The District Judge on appeal allowed that claim. My brother Mahmood, on appeal to this Court, for the reasons given in his judgment, confirmed the order of the Subordinate Judge and set aside the order of the District Judge with costs. From that decree of my brother Mahmood this appeal is brought under s. 10 of the Letters Patent. The case of *Kashi Nath* v. *Mukhta Prasad* (1), that of *Durga Prasad* v. *Munsi* (2), and that of *Hulasi* v. *Sheo Prasad* (3) are clear authorities in this Court, if any such authority was required, to show that the rule of the Muhammadan law which applies in pre-emption cases is that the person claiming pre-emption must claim the whole property sold and not part only if he has, as against the vendee, a pre-emptive right to the whole. Indeed, the case of *Hulasi* v. *Sheo Prasad* (3) shows that that rule applies even to the case of a pre-emptor who brings his action after another pre-emptor has already brought an action in respect of the same share. It is contended before us on behalf of Arjun Singh that we should construe the decree in these pre-emption suits as if they gave Arjun Singh a right to get the 2 annas 6 pies share even if he made default in paying the Rs. 1,308-9-0, the decreed pre-emption price in respect of the 3 annas share which was decreed to him. It is contended that such a decree would have been a good one according to the rulings of this Court. For that proposition three cases have been cited.

(1) I. L. R. 6 All. 370. (2) I. L. R. 6 All. 423.
(3) I. L. R., 6 All. 455.

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The first of those cases is that of *Salig Ram* v. *Debi Parshad* (1), a Full Bench case of this Court. That case is no authority for that proposition. That case simply decided that by the settlement administration papers of the village a sharer was entitled to maintain an action for less than the whole share sold. The next case was that of *Mahabir Parshad* v. *Debi Dial* (2). In that case this Court held that the appellants there, on payment of Rs. 200, were entitled to obtain a two-thirds share, and that one Duliman should pay into Court within the same time, that was one month, Rs. 100 and obtain a one-third share, and that if either of the appellants in that case or Duliman should fail to pay the amount within one month, "the other of them making the further deposit within the time shall be entitled to the share of the defaulter." It is perfectly plain from that judgment that the Court meant that the price of the whole share should be paid, and that not a part only of the price should be paid by some or one of the parties. The last case relied on is unreported. It is Second Appeal from Order No. 4 of 1886 (3). That case is very different from the present case. In that case the person before the Court was not a defaulter; he had in fact paid into Court the amount of money for which, in the result of his appeal, it had been decreed he should obtain a moiety of the share. Now I take it to be the law that in a case such as this, where two rival pre-emptors having each and equal right to claim pre-emption bring their pre-emption suits, and there is nothing in the *wajib-ul-arz* to the contrary, the rule of Muhammadan law must still be observed, and however the share may be divided by the decree of the Court between such successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on the default of one by the other, or that neither of them should obtain any interest in the share in respect of which the pre-emption suits arose. To hold otherwise would be to enable the shareholders in a village who did not wish to comply with the rule of Muhammadan law to which I have referred, where it applies, as in this case, to obtain possession of a portion of the share and leave the other portion of the share in the hands of the vendor or vendee. I must apply a reasonable construction to the decree of the Judge of Gorakhpur, and I hold that that decree meant, to take the case

(1) N.-W. P. H. C. 1875, p. 38. (2) I. L. R. 1 All. 201.
(3) Not reported.

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of Arjun Singh, that if he within a specified time paid the Rs. 1,308-9 in respect of the 3 annas share, he would be entitled, on default made by Sarfaraz Singh, to obtain Sarfaraz Singh's share on payment within the further period of fifteen days of the Rs. 1,090-7-0. I am of opinion that the judgment of my brother Mahmood is a right judgment in law, and that this appeal must be dismissed with costs.

BRODHURST, J.—I concur with the learned Chief Justice in dismissing the appeal with costs.

Appeal dismissed.

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January 31.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MATADIN AND OTHERS (JUDGMENT-DEBTORS) *v.* CHANDI DIN AND OTHERS (DECREE-HOLDERS).*

Execution of decree—Civil Procedure Code, ss. 246, 247—Cross-decrees—Set-off—Limitation.

Under two decrees of the Sadr Diwani Adalat passed in 1864, *A* was entitled to two-thirds and *B* to one-third of certain immoveable property, with mesne profits in proportion. Each obtained possession of the immoveable property decreed to him. *B* appealed to the Privy Council from both decrees in respect of the two-thirds awarded to *A*. In April, 1866, pending the appeal, *A* applied for an account of the mesne profits due to him after setting off the mesne profits due to *B*, but as he failed to comply with a condition requiring him to give security for the amount claimed, in case the Privy Council should allow *B's* appeal, the application was struck off. In January 1867 *B* applied for the mesne profits of the one-third decreed to him, and the Court found Rs. 18,000 to be the amount so due, but, on application by *A*, stayed further execution pending the Privy Council's decision. In 1873 the Privy Council dismissed *B's* appeal. In 1885, *A*, in execution of the Privy Council's decree, applied for Rs. 50,000 as mesne profits in respect of the two-thirds. *B* at the same time applied that the Rs. 18,000 declared in 1867 to be due to him in respect of the one-third might be set-off against the amount claimed by *A*.

Held that the question of the amount due to *A* up to the date when he acquired possession of the two-thirds and which had never yet been decided should be re-opened from the point at which it was left in 1866; that if this amount exceeded the Rs. 18,000 declared in 1867 to be due to *B*, satisfaction of *A's* claim to that extent should be entered up and the balance recovered from *B*; and that this course, if not strictly in accordance with the letter, was in accordance with the spirit, of ss. 246, 247 of the Civil Procedure Code, and at all events should be allowed on principles of natural equity.

Held also that until the amount due to *A* had been definitely ascertained in the execution department, *B's* right to maintain his set-off did not arise; that the set-off

* First Appeal No. 103 of 1887 from a decree of Pandit Ratan Lal, Subordinate Judge of Bánda, dated the 30th April, 1887.

was therefore not barred by limitation; that the order of January, 1867 was equivalent to a decree for the amount declared thereby as due to *B*; that when the execution department had determined the amount due to *A*, that decision also would be a decree, and that s. 246 of the Code could then be applied.

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MATADIN v. CHANDI DIN.

The facts of this case are fully stated in the judgment of Straight, J.

Munshi *Hanuman Prasad*, for the appellants.

Munshi *Ram Prasad*, for the respondents.

STRAIGHT, J.—This is a first appeal on the execution side from an order of the Subordinate Judge of Bánda refusing an application of the judgment-debtors, appellants, the nature of which I will presently explain. Before doing so it is necessary to state the facts connected with the litigation out of which it arose. In the year 1863 Raghunath and others, the ancestors of the now decree-holders, respondents, brought a suit in the Court of the Judge of Futehpur against Hatti Dubai and others, now represented by the judgment-debtors, appellants, for a declaration of their right to and possession of certain immoveable property and mesne profits valued at Rs. 76,099-12-1¾, and on the 28th July of that year the Judge gave the plaintiffs a decree in full for their claim. The defendants appealed to the Sadr Diwani Adalat, and that Court, on the 26th November, 1864, so far modified the Judge's decree as to hold the defendants entitled to retain one-third of the property with proportional mesne profits, but maintained it as to two-thirds. Hatti Dubai then appealed from this decision to their Lordships of the Privy Council in regard to the two-thirds as to which the Judge's decree had been sustained, while the plaintiffs rested content; and in the result their Lordships, on the 24th March, 1873, affirmed the decree of the Sadr Diwani. For convenience I will call this decree A.

In 1861 Hatti Dubai, ancestor of the judgment-debtors, appellants before us, had also brought a suit against the ancestors of the decree-holders, respondents, for immoveable property and mesne profits valued at Rs. 49,583-10-6½, which was dismissed by the Principal Sadr Amin of Bánda on the 27th of June, 1861. He then preferred an appeal to the Sadr Diwani Adalat, and on the 15th of August, 1863 that Court modified the decree of the first

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Court by giving the then plaintiff one-third of the property claimed. This decree was also appealed by the plaintiff Hatti Dubai to their Lordships of the Privy Council with regard to the two-thirds dismissed, and this appeal was consolidated with that mentioned as preferred from decree A and was disposed of by their Lordships in the manner I have already indicated. Under the decrees affirmed Hatti Dubai had been declared entitled to mesne profits for the years 1860 (1267 fasli) and thenceforward to date of possession, which were left to be determined on execution. This decree I will call decree B.

Now as to the execution proceedings in regard to decree A. The first application was made in September, 1863, and this was struck off on the 28th March, 1864. A second application was made in July, 1864, which was also struck off in March, 1865. In September, 1865 the decree-holders were awarded possession of the villages decreed, but an application then pending as to mesne profits was stayed. On the 17th of April, 1866 the decree-holder filed a petition, praying that an account might be taken of the mesne profits due to them under their decree B, and "after setting off the amount due to the other on whichever side whatever surplus is found may be realized by the party entitled to it." It would appear from the petition that the amount of *mesne* profits claimed by the decree-holders was Rs. 55,066-9-1½, and as the appeals were pending to the Privy Council, they were called upon to file security for that amount as a condition to their application being allowed, so as to provide for restitution in the event of the appeals succeeding, but according to an order of the 12th September, 1866, this they failed to do and their application was struck off.

As to the execution proceedings with regard to decree B, that was first executed on the 31st March, 1864, and the decree-holders were put in possession of the one-third of the property decreed to them. There were also certain proceedings taken under that decree with regard to mesne profits, and from them it seems that the decree-holders had applied to execute their decree for Rs. 24,159-15-9½ mesne profits, but that this had been objected to by the judgment-debtors, decree-holders of decree A, on the ground that the mesne profits recoverable by them under their

decree were much larger. Upon this application the Court granted a stay of execution. By a subsequent proceeding of the 26th January, 1867, in regard to decree B, the Court found that Rs. 18,165-12-9½ was the amount to which the decree-holders of decree B were entitled in respect of mesne profits. This closed the execution proceedings of that stage of the matter. As I have already stated, their Lordships of the Privy Council determined the consolidated appeals in regard to both decrees on the 24th March, 1873. On the 25th February, 1885, the decree-holders of decree A applied for execution of the order of their Lordships to this Court, and in the ordinary course it was sent to the Subordinate Judge for execution. The decree-holders of decree B then filed before the Subordinate Judge an application praying to have the amount of the mesne profits to which they were entitled under the decree applied by way of set-off. The Subordinate Judge refused to do so, and his order was appealed to this Court, which, on the 17th of December, 1886, allowed the appeal in a judgment the terms whereof are set out in the decision of the Subordinate Judge which is now before us in appeal. The Subordinate Judge has now in effect found that as only the two-thirds of the property decreed by decree A and dismissed by decree B was made the subject of the appeals to their Lordships of the Privy Council, while as to the one-third decreed to the appellants and never questioned by the respondents in appeal or by cross-objections the decree of the Sadar Diwani Adalat was left untouched, nothing was due to the appellants under the order of their Lordships, and further, that "inasmuch as there is no decree in existence regarding which the provisions of ss. 246 and 247 may be carried out, the Court cannot grant set-off. If both parties had produced their respective decrees as provided by s. 246, then proceedings would have been taken under ss. 246 and 247. As this has not been done, the Court is helpless and can only execute the decree produced before it."

The matter, therefore, seems to stand thus: in 1867, when the appeals by the appellants were pending in the Privy Council, the appellants had obtained possession of the one-third of the villages decreed them and the respondents of their two-thirds, which latter property alone was the subject of the appeal. As to the one-third that had passed beyond the region of controversy, and in any event

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the appellant was entitled to mesne profits in regard to it, up to the 26th of January, 1867, to the amount of Rs. 18,165-12-9½. But as to this sum it seems clear to me from what appears in the last sentence of the Sadr Amin's decision of that date that he held over granting execution in respect of it pending the decision of the Privy Council appeals. In other words, the Court decreed the decree-holders of decree B execution of their decree for mesne profits until it had been determined by their Lordships whether the decree-holders of decree A were entitled to the two-thirds of the property as to which they claimed their mesne profits, and indeed this was in accordance with the prayer of the petition put in by them asking for such a stay of execution, which was granted by the order of the 11th July, 1866. It seems to me, therefore, that if there was error in the proceedings, which I am not now determining, that was an error of the Court in which both parties acquiesced and indeed by their own action brought about, and of which neither should be allowed to take advantage to the detriment of the other. As admittedly both parties had obtained possession of their shares in the properties at the time of the Privy Council appeals being preferred, in the proportions which by their Lordships' order affirming the decrees of the Sadr Diwani Adalat were found to be the extent of their legal rights, each of them was entitled to an amount of mesne profits against the other up to the date of such possession being given, and as to the appellants that had found to be Rs. 18,165-12-9½, while in regard to the respondents it was alleged to be Rs. 56,066-9-1½, but the accuracy of this sum was not determined and still remains to be decided. In my opinion this latter question ought to be re-opened at the point at which it was left in 1866, and that when it has been ascertained what the respondents are entitled to if it exceeds the Rs. 18,165-12-9½ declared by the order of the 26th of January, 1867, to be the amount of mesne profits due from the respondents to the appellants, satisfaction of the claim of the respondents to that extent should be entered up and the balance be recoverable from the appellants. This is what it appears to me my brothers Oldfield and Brodhurst contemplated being done when they made their order of the 17th of December, 1886, and even if it is a course not strictly in accordance with the letter of s. 246 or 247 of the

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Civil Procedure Code, which I am far from conceding, it is certainly within their spirit and under any circumstances, on principles of natural equity, ought to be sanctioned. One point only remains. It is said that the set-off the appellants now claim is barred by limitation, as it was not put forward until more than twelve years from the date of the order of their Lordships had elapsed. It is clear that the respondents were the parties who under the order of their Lordships were released from the stay that had been put upon their proceeding, with execution for mesne profits, by the order of the 11th of July, 1866, and that they took this view of the matter is shown by their application of the 25th of February, 1885. It was well known to the appellants that the unascertained amount of the claim of the respondents against them was in any event sure to be considerably in excess of the amount to which they had been declared entitled by the order of the 26th of January, 1867, and until steps were taken by the respondents to have it ascertained, it was useless for them to claim a set-off—indeed the order of the 26th of January, 1867 seemed to contemplate their adopting that course. The respondents are now seeking to open up the question of mesne profits which was hung up by the Sadr Amín in 1866 and 1867, and in regard to which they themselves had recognised the right of the appellants to maintain a set-off for the counter mesne profits due to them upon the basis of the order of their Lordships of the Privy Council of March, 1873. Their application for execution, though delayed till almost the last moment, is within time; but until the execution department has ascertained definitely whether the whole of the Rs. 55,066-9-1½ claimed by them in 1866 or what part of it was due, the right of the appellants to maintain their set-off, the amount of which had been ascertained, did not in my opinion arise, and I, therefore, cannot hold that any bar of limitation stands in their way. The order of the 26th January, 1867, which they hold, declaring their right to Rs. 18,165-12-9½, is equivalent to a decree for that sum, and in my opinion, when the execution department has in the proceedings out of which this appeal has arisen determined the sum to which the respondents are entitled, that will also be a decree, and thus the provisions of s. 246 of the Civil Procedure Code can be applied.

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Such being the view I hold, I decree the appeal with costs, and, setting aside the order of the Subordinate Judge, direct him to dispose of the execution proceeding now pending in his Court with advertence to what I have said in the course of this judgment

BRODHURST, J.—I concur.

Appeal allowed.

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February 2

Before Mr Justice Brodhurst and Mr Justice Tyrrell.

ABDUL RAUMAN AND ANOTHER (PLAINTIFF) v. BEHARI PURI (DEFENDANT) *

Suit to establish right to sell property in execution of decree enforcing hypothecation—Suit against purchasers not parties to decree—Judgment-debtor declared insolvent pending suit—Decree holder scheduling his decree under Civil Procedure Code, s 352—Effect of schedule not to make suit unmaintainable

A suit to establish a right to bring to sale certain moveable property in execution of a decree for enforcement of hypothecation was brought against persons who were not parties to that decree and had purchased in execution of a prior decree Pending the suit, one of the judgment debtors under the hypothecation decree was declared an insolvent, and the plaintiff scheduled his decree as a claim under s 352 of the Civil Procedure Code

Held that the scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to and independent of it, and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree unmaintainable.

THE facts of this case were as follows:—On the 12th March, 1886, one Mata Ghulam obtained against Ram Din and Gulab Kuar a decree upon a hypothecation bond by which two palki-garis were hypothecated. The decree contained an order that the two garis were to be sold in satisfaction of the hypothecation. After this, one Goshain Behari Puri, in execution of a money decree against Ram Din, attached the same two garis and caused them to be advertized for sale, the notification announcing the lien upon the garis under Mata Ghulam's decree. He then purchased Mata Ghulam's decree. At the sale in execution of Behari Puri's original decree, one Nahori purchased one of the garis and afterwards sold it to Abdul Rahman The other was purchased by Sukun Behari Puri then proceeded to put in force the decree which he had purchased from Mata Ghulam by attachment of the

*First Appeal No 126 of 1887 from an order of Pandit Bansi Dhar, Subordinate Judge of Allahabad, dated the 26th June, 1887

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two garis. To this attachment objections were raised by Abdul Rahman and Nahori, upon which, on the 31st July, 1886, the garis were released. Behari Puri thereupon instituted the present suit under s. 283 of the Civil Procedure Code to establish his right to bring the property to sale in execution of Mata Ghulam's decree.

This suit was instituted in the Court of the Munsif of Allahabad. While it was pending, Ram Din, one of the judgment-debtors under the decree obtained by Mata Ghulam, applied to the Subordinate Judge of Allahabad for a declaration of insolvency, and in his application, under s. 345 of the Civil Procedure Code, he mentioned the decree held by the plaintiff among the pecuniary claims against him. The Court issued notice to the plaintiff among other creditors, and on the 20th November, 1886 framed a schedule under s. 352 of the Code, in which the decree was entered among the debts of Ram Din.

At the hearing of this suit the Court of first instance held that the suit was unmaintainable, on the ground that, under s. 352 of the Code, the declaration of insolvency was to be deemed a decree in favour of the plaintiff superseding that which he had purchased from Mata Ghulam, and in respect of which the suit was brought, and that the plaintiff could not seek any remedy apart from the insolvency proceedings. The Court accordingly dismissed the suit. On appeal, the Subordinate Judge set aside the decree and remanded the case for retrial under s. 562 of the Code. The defendants appealed to the High Court from the order of remand.

Pandit *Sundar Lal*, for the appellants.

Munshi *Hanuman Prasad*, and Lala *Juala Prasad* for the respondent.

BRODHURST and TYRRELL, JJ.—A few facts may be stated in this matter. Two persons, Ram Din and Gulab Kuar, mortgaged certain carriages to one Mata Ghulam, who, on the 12th May, 1886, brought a suit to recover his money and obtained a decree which declared that the carriages in question were charged with the debt and were liable to sale in satisfaction of it. The respondent here is the assignee of that decree from Mata Ghulam. The respondent was himself a decree-holder against the same Ram Din mentioned above for another debt, and in execution of that decree

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he got one of the carriages sold, and it was bought by persons who transferred it to the present appellants. The respondent in execution of that decree of Mata Ghulam attempted to enforce his charge against one of the carriages, but was defeated by an order of the Court executing the decree made on the 31st July, 1886, and that order has given rise to the present suit which has been brought under the provisions of s. 283 of the Civil Procedure Code. The respondent, against whom the order of the 31st July, 1886, was made, has instituted this action to establish the right which he claimed to the carriage in dispute, and he has coupled with this suit a claim for damages in the event of it being found that the defendants have improperly converted the carriage and made it unavailable in satisfaction of his claim.

The Court of first instance held that this action was not maintainable. The lower appellate Court reversed that finding and remanded the case for decision under s. 562 of the Civil Procedure Code. There is no doubt that that order was correct in one respect; that there were no materials on the record which would enable the Court of first appeal to determine the case for itself. But in this appeal it is contended by the defendant that the present action is unsustainable, inasmuch as the plaintiff (respondent) has had to take action under s. 352 of the Code, and because Mata Ghulam's decretal debt was scheduled in his favour by the Court exercising insolvency jurisdiction at Allahabad, the insolvent in question being Ram Din, one of the judgment-debtors under Mata Ghulam's decree.

Mr. *Sundar Lal* has argued with much force that the effect of the respondent scheduling his decretal claim under Mata Ghulam's decree against Ram Din is that Mata Ghulam's decree has been superseded and put out of existence, and that to allow the respondent to maintain the present action would be to put him in the position that, while holding a new decree in supersession of Mata Ghulam's decree, he might obtain another and independent remedy with regard to the same original debt which was the subject of the decree of the 12th May, 1886.

It seems to us that there is more ingenuity than force in this contention. The scheduling of the respondent's claim under s. 352,

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with reference to Mata Ghulam's decree, had not the effect of superseding that decree or of creating another decretal right in addition to it or independent of it, and therefore there does not, out of this circumstance alone, arise any impediment to the maintenance of the present action, which, as we said above, is brought under s. 283 of the Code to establish against persons who are strangers to the decree of the 12th May, 1886 the right which the respondent claims to have in the carriage which was the subject of that decree, but has now passed into the possession and control of strangers to that decree.

It seems to us that the present action is founded upon a new and different cause of action, and being brought against persons who are no parties to Mata Ghulam's decree, there can be no question of the competence of the respondents to maintain his present action. The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.
J. C.
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December 13*th and* 14*th*

THAKRO AND OTHERS (DEFENDANTS) *v.* GANGA PRASAD, (PLAINTIFF)

[On appeal from the High Court for the North-Western Provinces.]

Shares in village held by wife of former proprietor—Stridhan.—Mitakshara—Mutation of names in the settlement record.

A share in a pattidari village given by a Hindu proprietor to his wife may become her stridhan, within the contemplation of the Mitakshara, section 11, cl. 1, enabling her to make a valid gift of it.

A transfer from a husband of a share in a village was not formally carried out, otherwise than by its being evidenced by mutation of names in the settlement record; and a son, claiming as his father's heir, alleged that his mother's name was only used *benami* by the father.

Held, that a finding that such mutation was not for the purpose of putting the property into the name of the wife, *benami* for the husband, but for her own benefit, was substantially correct.

Appeal from a decree (23rd January, 1883) of the High Court, reversing a decree (15th July, 1880) of the Subordinate Judge of Aligarh.

The question on this appeal was whether a widow, whose deceased husband had been in his lifetime a lambardar and pat-

Present: LORD FITZGERALD, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

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tidar in the pattidari village of Shahpur Thator, tahsil Iglas, in the Aligarh district, was herself the owner of shares in the village, recorded in her name in the settlement record, or that husband had been, till his death, the actual proprietor, holding them in the name of his wife. He had gradually acquired all the shares in the mauza, which originally consisted of three thokes, and on his application, by petition filed in 1862, all the shares were entered in the name of his wife.

This petition stated that he, Ganesh Singh in partnership with his wife, Musammat Thakro, was a share-holder of mauza Shahpur Thator, and applied for the striking out of his name as a sharer in that mauza, and the name of Thakro alone should be entered as the proprietor of all the shares, as the administration paper was then being written. Whether the *dakhil kharij* that followed represented a merely nominal, or an actual, transaction was the question in this suit; which was brought by Ganga Prasad, the son of Ganesh Singh, who died on the 12th October, 1872, leaving Thakro, his widow, by whom he had one son, the said Ganga Prasad, and two daughters. He also left another son Dipchand, by another wife, a minor when this suit was brought. He made a will, it was said, five days before his death, leaving all his estate to his sons in equal parts. Upon the assumption that the name of Thakro was entered "*ism-farzi*" in respect of this mauza, Ganga Prasad would have had only a moiety. But he claimed to have inherited the whole mauza, alleging that Ganesh Singh had, by effecting mutation of names, as above stated, exempted it from the operation of his will. The plaint stated that Ganesh Singh acquired the whole of the mauza by taking mortgages of shares of other share-holders, and by purchases, partly in his own name, and partly in Thakro's name; and that in 1862 he caused her name to be recorded as owner of the entire property, although the mauza remained in his possession. That after Ganesh's death in 1872, the mauza remained under the plaintiff's management. Also that the deed of gift executed by Thakro on the 6th May, 1878, in favour of her daughters, was false in describing the mauza as her acquired property and *stridhan*.

The defence insisted on Thakro's having had a beneficial ownership. The defendants' written statement was that Ganesh Singh

"had given away his entire share consisting of 679 bighas 2 biswas in the disputed village to his wife Thakro, before the birth of the plaintiff, and put her in proprietary possession. The Musammat herself purchased 636 bighas 13 biswas of the mauza, and thus under two different titles she had been in possession of the entire village for more than 12 years."

On issues framed to question the point, the Subordinate Judge, Saiyad Farid-ud-din Ahmad Khan Bahadur, found that the whole of the shares were the property of Thakro, and up to the date of the deed of gift by her, had remained in her possession. The first of the three thokes of which the mauza at one time consisted was bought in 1845 in the names of the father and brother respectively of Ganesh Singh, who afterwards obtained *dakhil kharij* in his own name. The second *thoke* was let in farm, as a settlement operation, to Ganesh Singh about 1847; and he, in 1848, bought up the rights of the proprietors in his own name. In the same year, the rights of other proprietors of shares were bought at auction in the name of Thakro to the extent of 205 bighas 4 biswas. The shares in the third thoke were taken in mortgage in 1847, in the name of Thakro as mortgagee, and afterwards in the same year Ganesh Singh bought up the rights, subject to such mortgage, of seven proprietors, to the extent of 276 bighas 1½ biswas, at a sale in execution of decree. The Subordinate Judge also held that the mauza had become Thakro's stridhan, or separate property, and, as such, was transferable by gift. He also, having fixed an issue to this effect, "if the mauza be held to have been owned by Ganesh Singh, is the plaintiff entitled to sue for sole possession thereof, when the other son, Dip Chand, is alive:" held, on this issue, that the plaintiff could not, consistently with claiming an exclusive title, rely on an exclusive title through Ganesh Singh; inasmuch as the fact, if true, that the mauza remained Ganesh's property till his death, would have brought in Dip Chand as entitled to one-half.

The plaintiff appealed to the High Court denying that Thakro had any "exclusive property, or transferable right, in the mauza;" and he again asserted his sole right of inheritance.

The High Court (Straight and Tyrrell, J.J.) held that the plaintiff had made good his appeal "on the ground that the record

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of his mother's name was of the commonplace *ism-farzi* character, and that she consequently, and in fact, never had any possession of the property in any way adverse to Ganesh Singh, its owner, or to the plaintiff, who, with his half-brother, Dip Chand, was his heir."

The High Court, thereupon, decreed that the plaintiff should recover possession of the whole of the property, in which he was declared to be only entitled to a half share, the right of the donee from Thakro being declared null and void, and it being further declared that the decree should not affect the rights and interests of the minor son, Dip Chand.

On this appeal,

Mr. *J. Graham, Q.C.*, and Mr. *H. Cowell*, for the appellants, contended that the beneficial ownership of Thakro had been proved; and that her gift was valid, as having been made of her stridhan. The decree of the High Court was erroneous. Dip Chand's interest, if he had any, could not be protected in the way attempted by the decree, which, on the face of it showed that the case sought to be made out was an inconsistent one. They relied on prior representations made by the plaintiff himself, and on the evidence generally, as showing that the name of Thakro had not been used merely for that of her husband, but as indicating a real ownership.

Mr. *J. D. Mayne*, and Mr. *J. G. Witt*, for the respondent, relied on the evidence as to the actual management of the land comprised in the shares. This had been throughout in the hands, first of Ganesh Singh, and then of his son Ganga Prasad. Thakro had been proprietor in name only; and the judgment of the High Court was right.

The cases referred to on both sides were *Nawab Azimut Ali* v. *Ilurdwaree Mull* (1) *Uman Parshad* v. *Gandharp Singh* (2), *Sreeman Chunder Dey* v. *Gopaul Chunder Chuckerbutty* (3), *Gopeekrist Gosain* v. *Gungapersaud Gosain* (4).

Counsel for the appellants, were not called upon to reply.

Their Lordships' judgment was delivered by SIR B. PEACOCK.

(1) 13 Moo. I. A. 395.
(2) L. R., 14 I. A., 127; I. L. R., 15 Calc. 20.
(3) 11 Moo. I. A. 28.
(4) 6 Moo. I. A. 53.

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THAKRO v. GANGA PRASAD.

SIR B. PEACOCK.—This is an appeal by Musammat Thakro and other ladies against Ganga Prasad, the respondent. The appeal is from a decree of the High Court of the North-Western Provinces at Allahabad. The suit was brought by Ganga Prasad against Musammat Thakro, his mother, and the other ladies, who were the daughters of Musammat Thakro, in whose favour the mother had executed a deed of conveyance. The plaintiff alleged that his father, Ganesh Singh, "had a large property; that he, on different occasions, by mortgage and private and public purchase, having obtained mauza Shahpur Thator in his own name, as well as in the name of Musammat Thakro, plaintiff's mother, himself remained in possession thereof. Subsequently, in 1862 and 1863, the name of the said Musammat was recorded in respect of the entire property in the said mauza, though the said Ganesh Singh continued in possession of it." He then alleged that on the 12th October, 1872, Ganesh Singh, executed a will, and "on the 17th October, 1872, died, and that Musammat Thakro, plaintiff's mother, continued to live with him (plaintiff), and the village in dispute, like other paternal estates, remained under the management of the plaintiff." Then he proceeded as follows:—"On the 6th May, 1878, the said Musammat Thakro executed a false deed of gift"—by which he meant a deed of gift which she had not the power to execute—"of the said mauza in favour of her two daughters, Musammat Radha and Bhawani, describing the said mauza to be her acquired property and *stridhan*, and thus effected the plaintiff's dispossession ever since the Musammat began to live separate, which is the time when the cause of action arose. The village in dispute being the acquired property of the plaintiff's father, who had simply on account of affection caused the name of Musammat Thakro to be entered, the latter was not, under the Hindu law, competent to transfer the property to her daughters. The plaintiff is, in every way, entitled to get the property. The plaintiff therefore seeks for the following reliefs: (1) that the plaintiff's right may be declared in respect of the disputed property, and the deed of gift executed on the 6th May, 1878, by Musammat Thakro, defendant, in favour of Musammats Bhawani and Radha, be declared invalid, void, and inoperative, as far as the plaintiff's right is concerned; (2) that both the last mentioned

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defendants may be dispossessed of the disputed mauza, and their right as donees declared null and void."

A written statement was put in on behalf of the ladies, and the case being tried by the Subordinate Judge, he raised several issues, the principal one of which was the fourth :"Whether Shahpur, the village in dispute, is wholly or partly the personal property of Ganesh Singh; and he alone remained in possession as long as he lived, and since his death, the plaintiff remained in possession thereof till the date of the accrual of the cause of action, and is therefore entitled to possession thereof; or the village in question is wholly or partly the personal property of Musammat Thakro, the widow of Ganesh Singh, deceased, who has been in possession thereof for more than 12 years, and the defendants are in possession from the date of gift, and the plaintiff's claim is therefore barred by lapse of time and he has no right in the property in dispute." Upon that the Subordinate Judge says :—" Just as the defendants have not proved their assertion, so the plaintiff also has not proved that Ganesh Singh fictitiously transferred that amount of land of the village of Shahpur Thator which was in his name to Musammat Thakro." The question really was whether, when the mutation of names was made from the name of Ganesh into the name of his wife, it was his intention to transfer the property into the name of his wife *benami* for him. The Subordinate Judge upon this point says :—"In short, a careful consideration of all the oral and documentary evidence and presumptions and probabilities clearly leads the Court to infer that the whole of the village in dispute is the property of Musammat Thakro, and is not the estate left by Ganesh Singh, and that up to the date of the deed of gift in question it remained in her possession." The Subordinate Judge therefore found in substance that the mutation of names in 1862 was not for the purpose of putting the property into the name of the wife *benami* for the husband, but for her own benefit.

Upon appeal to the High Court that Court came to a different conclusion. They held that the property was put by the husband into the name of the wife to hold it *benami* for him, and that consequently the property remained the property of the husband, and

that the wife had no power to assign it to her two daughters, although it stood in her name.

A considerable part of this property, as shown by the Subordinate Judge in his judgment, was purchased in the name of Ganesh, the husband, and certain other parts in the name of the wife. The wife gave evidence that that portion of the property which was purchased in her name was purchased for her benefit and with her own money. It is unnecessary to decide whether the part of the property which was purchased in the name of the wife was purchased with her money or with that of her husband, because even if the property which was purchased in the name of the wife was the property of the husband, as well as that which was purchased in his own name, the question still remains whether when the husband allowed the mutation of names from his name into the name of his wife, he intended that mutation to operate for his own benefit or for hers.

The wife in her evidence in the cause stated that in the year 1847, when the husband was about to marry a second wife, that portion of the property which had been purchased in the name of the husband was made over to her in consideration of his being about to marry a second wife, and that afterwards the other portions of the property were bought in her name, so as to make the whole her property.

In the Mitakshara, section 11, clause 1, speaking of the nature of *stridhan*, it is thus stated: "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other separate acquisition, is denominated a woman's property." It is not unusual for a husband, upon his being about to marry a second wife, to make a present to his first wife, and if he does so, the property so presented becomes her *stridhan* according to the doctrine above laid down. The wife says that in the year 1847, when the husband was about to marry a second wife, he did make her a present of the property which had been purchased in his own name. Although the High Court has found that there was no actual proof of that fact, it is not improbable that the husband, when about to marry a second wife, should have stated to his first

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wife that he would appropriate that part of the property which he had purchased in his own name as a present to her in consideration of his being about to marry the second wife. The statement of the wife is corroborated by the fact that in the year 1862 he caused the property to be changed from his own name into that of his wife. On the 4th March, 1862, he says:—"In partnership with my wife, Musammat Thakro, I am the lambardar and a shareholder of mauza Shahpur Bhatai, pargana Gori. Now, of my own free will, I pray that my name as sharer in the said mauza be expunged, and that of the said Musammat alone be entered as proprietor of both the shares, as the village administration paper is being written now. I have no longer any claim." If when he was about to marry the second wife he told his first wife that he would make her a present of the property and did not carry out the gift by an actual deed, and in 1862 caused a mutation of names declaring that he had then no longer any claim to the property, that would not show that he was causing the mutation in order that the wife might hold it *benami* for him. There was a complete mutation of names from the husband of all that he possessed in the village of Shahpur into the name of the wife. The subsequent purchases were made in the name of the wife. If he intended the subsequent purchases, though made with his own money, to be made in the name of his wife, the probability is that he intended the whole of Shahpur to be vested in her as her *stridhan*. The plaintiff claims it as his own property. It is to be remarked that by the second wife his father had another son, Dip Chand. If the property had been transferred in 1862 into the name of Thakro, *benami* for the father, it would have remained the father's property, and being the father's property would have descended to his two sons. But the plaintiff does not claim it as being the property of the two sons. He claims it as his own property, and as having been put into his mother's name in order that he might become entitled to the benefit of it; not that it was put into his mother's name in order that it might be held by the mother *benami* for the benefit of the father.

Several documents were put in. There is a copy of a petition "by Ganga Prasad against Musammat Thakro, his mother, and Musammats Radha and Bhawani, his sisters." That was dated in

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1878, after the mother had executed the conveyance in favour of her daughters. In paragraph 3 he says:—"The appellant's father caused the name of Musammat Thakro, mother of the appellant, to be entered in respect of the property through some policy. The name of the appellant's mother was entered simply with a view that the children born of the other wife of the appellant's father might not get a share in this property, and that the appellant alone might get it." The father, when he made this transfer of Shahpur into the name of the mother, did not appear to have had any creditors or any particular reason for putting this portion of his property into the name of the mother instead of allowing it to remain in his own name, unless it was for the purpose of giving the mother a benefit. If he had intended to put the property into the hands of the mother in order to conceal it from his creditors, and to make it appear that it was his wife's property instead of his own, the probability is that he would have done the same with regard to his other property, and not only in respect of this particular village.

The representation on the part of the plaintiff shows that whatever the object of his father in making the mutation was, it was not to put the property into the hands of the mother to hold it *benami* for the father. If he had put it into her hands with that object, the two sons would have become entitled to it; but the case of the plaintiff is that the object of the father in putting it into the name of the mother was that the issue of the second wife should have no share in it.

Further, a petition of guardianship was put in evidence. It was an application by Ganga Prasad, the plaintiff. He there says:—"My father, Ganesh Singh, died in October, 1872, leaving two sons, i.e., myself and Dip Chand, a minor"—that is, the son of the second wife—"who is now 2½ years old, as his heirs, and we two sons of the deceased are owners in equal shares of the property left by him." If the property remained the father's, Shahpur, as as well as all the other properties, would have been the joint property of the two sons, Dip Chand and himself; but in a schedule to the petition particularising the property which his father left, he excluded Shahpur. That was either a gross fraud upon his bro-

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ther, whose guardian and trustee he then was, with the intention of causing it to be believed that Shahpur, which was held, as he alleged, by his mother for the benefit of his father, was not the property of his father, or he must have believed at the time that the property was put into the hands of the mother, not *benami* for the father, but for some other purpose. He afterwards filed a list of the property left by his father, in which Shahpur is excluded, which shows that there was no mistake in the omission of Shahpur. In both these documents Shahpur is excluded as property left by the father, which if left by the father would have belonged to himself and his brother. In his evidence, he says :— "I know and consider Shahpur Bhatai to be my own share and not that of Dip Chand." In the face of these statements he cannot now contend that the property was held by his mother *benami* for his father. He contended at one time that the property was put into his mother's name *benami* for himself. If that were so, it was for him to prove the fact, which he was unable to do.

Looking at the conduct of the plaintiff and at the representations which he made, which would have been grossly fraudulent if the property had been in the mother's name *benami* for the father, their Lordships have come to the conclusion that the case of the plaintiff is not made out, *viz.*, that the property was put into the hands of the mother *benami* for the father. Their Lordships do not believe that it was put into the hands of the mother for the purpose of giving the plaintiff the sole interest in the property, or that it was put into the hands of the mother *benami* for the father.

Under these circumstances their Lordships think that the High Court came to an erroneous conclusion in reversing the judgment of the Subordinate Judge upon the fourth issue, in which he found, upon the evidence and upon the statements of the plaintiff, that the property was the property of Thakro and not the property of the plaintiff. The plaintiff even in his plaint does not state that the property was that of himself and Dip Chand, but claimed it as his own property. Dip Chand was no party to the suit, as he ought to have been if the property was that of the father.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed and the decree of

the Subordinate Judge affirmed, and that the respondent be ordered to pay the costs of the appeal to the High Court. The respondent must also pay the costs of this appeal.

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Appeal allowed.

Solicitors for the appellants: Messrs. *Ford, Rankin Ford, and Ford.*

Solicitors for the respondent: Messrs. *Pritchard and Sons.*

APPELLATE CRIMINAL.

1888 January 16.

Before Mr. Justice Mahmood.

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Evidence—Witnesses—Competency of persons of tender years—Act I of 1872 (Evidence Act), s. 118—Judicial oath or affirmation—Act X of 1873 (Oaths Act) ss. 6, 13—Omission to take evidence on oath or affirmation.

S. 6 of the Oaths Act (X of 1873) imperatively requires that no person shall testify as a witness except on oath or affirmation; and, notwithstanding s. 13 of the same Act, the evidence of a child of eight or nine years of age is inadmissible if it has been advisedly recorded without any oath or affirmation. *The Queen* v. *Sewa Bhogta* (1) dissented from.

The nature of judicial oaths and affirmations and the history of Indian legislation on the subject discussed.

The facts of this case are stated in the judgment of the Court.

The appellant was not represented.

The *Public Prosecutor* (Mr. *G. E. A. Ross*) for the Crown.

MAHMOOD, J.—In this case the two prisoners, Maru and Fatteh, were tried together and both have been convicted. The prisoner Maru has been convicted under s. 363 of the Indian Penal Code and sentenced to two years' rigorous imprisonment, and the other prisoner, Fatteh, has been convicted under s. 368 read with s. 363 of the Indian Penal Code, and sentenced to one year's rigorous imprisonment.

Both prisoners have appealed. So far as Maru is concerned I have arrived at the same conclusions on the evidence as the assessors and the learned Sessions Judge. The substantive offence charged against Maru was that of kidnapping within the meaning of s. 363

(1) 14 B. L. R. 294.

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of the Penal Code, and the person kidnapped was a girl, Musammat Thakuri, whose father has stated her age to be about nine years. She was examined as a witness for the prosecution, but without any oath or solemn affirmation, and this circumstance has furnished one of the difficulties in the case. Speaking of her the learned Judge remarks :—"She is of tender years and does not understand the obligations of an oath, but was cautioned to speak the truth, and is a competent witness as far as intelligence is concerned."

Again with reference to the prisoner appellant Fatteh the learned Judge goes on to say :—

"As regards Fatteh two of the assessors think the charge proved, the third does not. The case depends entirely and solely on the evidence of the little girl. Two of the assessors believe it; think it impossible she can have been tutored: third does not believe it."

Again the learned Judge goes on to say :—

"Why Fatteh should assist Maru in the concealment is not clear and has formed the chief stumbling-block to the third assessor; but Maru is an old Raipur man and has dealings admittedly with Fatteh. Moreover, if I have not been much mistaken in my observation, Fatteh has from behind his clasped hands held in front of his face been whispering advice to Maru all through the case as to what answer he should give and what questions put. I agree, therefore, with the assessors in convicting Fatteh."

The conclusions at which the learned Judge arrived are stated in the following paragraph of his judgment :—

"Maru's intent in kidnapping is not shown or Fatteh's in concealment. At the best I am willing to credit it to Maru that he only wished to annoy and distress Ami Chand and perhaps merely extort some advantage from him—such as cattle-lifters in these parts steal cattle—and that Fateh was abetting him in this. Without exacting anything, the child was restored in a few days, under the influence of fear of prosecution, in so great harm done." (*sic.*)

So far as the case of Maru is concerned the evidence of the girl Thakuri is of no great consequence, as the rest of the evidence is in itself sufficient to warrant his conviction. But the case

against the prisoner appellant Futteh rests entirely upon the testimony of the girl Thakuri; and it thus becomes important to consider whether her statement is to be accepted as evidence in this case, and if so, whether it is sufficiently trustworthy to warrant the conviction.

The former of these questions depends entirely upon the law relating to the competency of witnesses and to the obligation of oaths or solemn affirmations to be made by them in judicial proceedings.

First, then, as to the competency of Musammat Thakuri to be a witness. It is important to observe that upon the findings of the learned Sessions Judge, her age must be taken to be eight or nine years, and she must be held to have not attained such maturity of mind as would enable her to realize the solemnity or obligation of an oath or affirmation.

So far as the simple question of age is concerned I have no doubt that Musammat Thakuri could be called as a witness. Whatever the rule of law or the practice of the Courts may have been antecedent to the year 1855, the Legislature in passing the Evidence Act (II of 1855) of that year laid down a definite rule in s. 14 (clause 1) of that enactment, the effect of which is to declare the incompetency to testify of "children under seven years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly." The law, however, as it now stands contains a more comprehensive rule in s. 118 of the Indian Evidence Act (I of 1872) for which we are indebted to the labours of an eminent jurist, Sir James Stephen, now one of Her Majesty's Judges in England. The section lays down the rule that "all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving natural answers to those questions by tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind."

The tender age of Musammat Thakuri would not therefore, *ipso facto*, render her incompetent to appear as a witness to give testimony. Indeed, the effect of our law seems to me to be the same

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as the rule of the English law of evidence on this particular point, and that rule is nowhere stated better than in s. 1377 of Taylor's work on Evidence (Vol. II, p. 1170, 8th ed.), where it is stated:—"With respect to *children* no *precise age* is fixed by law, within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of *intelligence* and *knowledge* which will render a child a competent witness. In all questions of this kind much must ever depend upon the good sense and discretion of the Judge; who will do well in remembering the wise rule promulgated by the Indian Evidence Act of 1855, that 'children under seven years of age, who appear incapable of receiving just impressions of the facts' to be deposed to 'or of relating them truly,' ought not to be examined. In practice it is not unusual to receive the testimony of children of *eight or nine years of age* when they appear to possess sufficient understanding; and in *Brasier's* case (1), which was an indictment for assaulting with intent to rape an infant who was certainly under seven years of age, and perhaps only five, all the Judges held that she might have been examined upon oath if on strict examination by the Court she had been found to comprehend the danger and impiety of falsehood. But in *Pike's* case (2) Mr. Justice Park, with the concurrence of Mr. Justice James Parke, promptly rejected the dying declarations of a child of four years of age, observing that however precocious her mind might have been, it was quite impossible that she could have had sufficient understanding to render her declarations admissible."

I must, however, at the risk of prolixity read another passage from another celebrated work of English law—Roscoe's Criminal Evidence (p. 115-16, 10th ed.)—as much that is contained in that passage will conveniently bring me to the next point as to the legal admissibility of Musammat Thakuri's evidence in this case. The passage runs as follows:—

"It is said by Gilbert, C.B., that infants under the age of fourteen are not regularly admissible as witnesses, though there is no time fixed wherein they are to be excluded from evidence,

(1) 1 Leo. 190; 1 East P. C. 443. (2) 3 C. and P. 598.

but that the reason and sense of their evidence are to appear from the questions propounded to them and their answers. Gilb. Ev., 144. At one time their age was considered as the criterion of their competency, and it was a general rule that none could be admitted under the age of nine years, very few under ten : *R.* v. *Traver*, 2 Str. 700; 1 Hale P. C. 302; 2 Hale P. C. 278; 1 Phill. Ev., 10th ed., 8. But of late years no particular age is required in practice to render the evidence of a child admissible. A more reasonable rule has been adopted and the competency of children is now regulated not by their age, but by the degree of understanding which they appear to possess. 1 Phill. Ev. 4, 10th ed., 8. In *R.* v. *Brazier*, 1 East P.C., 443, 1 Leach 199, S. C. Blackstone, Nares, Eyre, and Buller, JJ., were of opinion that the evidence of a child five years of age would have been admissible if she had appeared on examination to be capable of distinguishing between good and evil. But others of the Judges, particularly Gould and Willes, JJ., held that the presumption of law of want of discretion under seven was conclusive. Subsequently all the Judges agreed that a child of any age, if capable of distinguishing between good and evil, might be examined upon oath, and that a child of whatever age could not be examined unless sworn. This is now the established rule in all cases, civil as well as criminal, and whether the prisoner is tried for a capital offence or one of an inferior nature. According to this rule the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also in part upon their having received a certain share of religious instruction. A child whose intellect appears to be in other respects sufficient to enable it to give useful evidence, may from defect of religious instruction be wholly unable to give any account of the nature of an oath or of the consequences of falsehood (1 Phill. Ev. 9, 10th ed.) In a recent case of trial for murder, where it appeared that a girl eight years old up to the time of the deceased's death was totally ignorant of religion, but subsequently she had received some instruction as to the nature and obligation of an oath, but at the trial seemed to have no real understanding on the subject of religion or a future state, Patterson, J., would not allow her to be sworn, observing: 'I must be satisfied that this child feels the binding obligation of an oath from the

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general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath recently communicated to her for the purposes of this trial; and as it appears that previous to the happening of the circumstances to which this witness comes to speak she had had no religious education whatever and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony. *R* v. *Williams*. (1) Mr. Pitt Taylor observes upon this case—Ev. 1077, 2nd ed.—Perhaps the language which the learned Judge is reported to have used was somewhat stronger than the law warranted, and it certainly went further than the facts required, as the child even when offered as a witness had no real knowledge of the nature of an oath. Had not this been the case, it seems difficult to understand upon what valid ground her testimony could have been rejected; for whether she was instructed in religious knowledge previously or subsequently to the commission of the crime in question, or whether the instruction was intended to excite permanent feelings or merely to secure the temporary purpose of enabling her to swear to the facts she had witnessed, can signify nothing, provided that at the time when she was called upon to give her evidence she was really aware of the solemn responsibility which devolved upon her of speaking the truth. Accordingly in Ireland it has been held that, even on an indictment for murder, an infant might be examined though her religious knowledge had been communicated to her after the perpetration of the offence, and with the sole object of rendering her a competent witness." *R.* v. *Milton* (2) (Ir. Cr. Rep. 61) per Doherty, C. J. In *R.* v. *Nicholas* (3) (2 C. and K. 246) Pollock, C. B. refused to put off the trial in order that a child of six years old might receive instruction, but said that he thought there were cases in which such an application might be entertained; and that the Judge should act according to his discretion."

Such, then, being the rules of English law, I have to consider how far our law renders an oath or solemn affirmation a condition

(1) Ev. 1077, 2nd ed. (2) Ir. Cr. Rep. 61.
(3) 2 C. and K. 246.

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precedent to the admissibility of the testimony of a witness. And in order to consider the question I intend to go into the history of legislation in British India on the subject. But before doing so it is somewhat important to bear clearly in mind what an oath or solemn affirmation really means or implies. In Taylor's work (s. 1382, p. 1175, 8th ed.) "*oath*" is defined on the authority of *R.* v. *White* (1 Lea. 403) and the *Queen's Case* (2 B and B. 285) to be "a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven if he does not speak the truth." And the learned author, with reference to this definition, goes on to say that it "may be open to comment, since the design of the oath is not to call the attention of God to man, but the attention of man to God; not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so; still, it must be admitted that by thus laying hold of the conscience of the witness the law best insures the utterance of truth."

But a much more complete definition of *oath* is given by Bentham (who has been rightly denominated as the father of English jurisprudence), at p. 191 of vol. 5 of his works. He says:—

"By the term *oath*, taken in its largest sense, is universally understood a ceremony composed of words and gestures, by which the Almighty is engaged eventually to inflict on the taker of the oath, or *swearer*, as he is called, punishment in quantity and quality, liquidated, or more commonly unliquidated, in the event of his doing something which he, the swearer, at the same time and thereby engages not to do or omitting to do something which he in like manner engages to do. Correlative to the term *oath* is the term *perjury*, and it conjugates to *perjure oneself*, *perjured*, *perjurious*; among which *perjury* is understood as designation of the conduct, whether positive or negative, which stands in opposition to the conduct engaged for, as above." And the same thinker in considering the efficiency of an oath goes on to say (p. 195):—

"When the question has been concerning a Muhammadan, a Hindu, a Chinese, or even a Christian, if a Catholic, great doubts have been entertained by pious and learned Church of England

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men—lawyers and non-lawyers—concerning the degree of binding force, which in any such heterodox bosom ought to be ascribed to the ceremony of an oath." The doubts to which this passage refers have, however, been set at rest by the leading case of *Omichund v. Barker* (1), where the Lord Chancellor and three other Judges concurred in laying down the rule that the depositions of witnesses professing the Gentoo (Hindu) religion who were sworn according to the ceremonies of their religion, taken under a commission out of Chancery, could be admitted and read as evidence.

In stating the history of the law in British India relating to oaths and solemn affirmations I do not think it is necessary to go behind Act V of 1840, beyond saying that probably in consequence of the practice adopted by Muhammadan Judges before the advent of the British rule, certain old Regulations passed by the Government of the East India Company required that Muhammadans were to be sworn on the Koran and the Hindus on the Ganges water. So stood the law when Act V of 1840 was passed, and the only provisions of the Act which I wish to refer to are contained in the first section of that enactment. That section runs as follows :—

"Whereas obstruction to justice and other inconveniences have arisen in consequence of persons of the Hindu or Muhammadan persuasion being compelled to swear by the water of the Ganges, or upon the Koran, or according to other forms which are repugnant to their consciences or feelings :

"It is hereby enacted, that except as hereinafter provided, instead of any oath or declaration now authorised or required by law, every individual of the classes aforesaid within the territories of the East India Company shall make an affirmation to the following effect :—

"I solemnly affirm, in the presence of Almighty God, that what I shall state shall be the truth, the whole truth, and nothing but the truth."

The effect of this alteration of the law was of a very significant character, with reference to the means and guarantees which Courts of justice had for ascertaining the truth from the evidence of native

(1) 1 Sm. L. C. 381.

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witnesses. It is not for me, sitting here as a Judge, to consider questions of political import; but I think that it is within my province to say that, so far as the administration of oaths furnishes a guarantee for truth, the provisions of Act V of 1840 were of such a sweeping character as, in the case of most witnesses, rendered that guarantee totally ineffective. For either there is a use in an oath or a solemn affirmation, or there is no such use; and what is the use of an oath or affirmation which is not binding upon the conscience of native witnesses, whether Hindu or Muhammadan? My own past experience both as a member of the Bar and as a Judge of the Courts of first instance warrants my saying that in the vast majority of cases the solemn affirmation introduced by Act V of 1840 in lieu of the older form of oath is not treated or felt by native witnesses as binding upon their conscience. And in view of this circumstance it is a question of great importance how far our law of perjury in the apportionment of punishment should be applied to cases in which a native witness, to whom no such oath as is binding upon his conscience has been administered, has not spoken the truth after the solemn affirmation provided by the law, and which affirmation he feels not binding upon his conscience. I am aware of the reasons which induced a philosophical jurist of the eminence of Jeremy Bentham to object to the whole theory of administering oaths, but with all the veneration and respect which I entertain for him, I, whilst not prepared to dissent from his views in the abstract, cannot help feeling that the sweeping alteration of the law by Act V of 1840 went too far with reference to the religious and social conditions of India, and that the desired results could have been probably achieved without abolishing the old forms of oaths altogether in the case of Hindus and Muhammadans. And it is with due respect for the wisdom of the Legislature that I say that the Act V of 1840 seems to proceed upon the theory of taking exceptional cases as the basis of that legislative measure, and that it does not seem to have taken into account the effect of the change on the vast majority of native witnesses.

It is, however, now perhaps too late to re-open the question; and because *judicis est jus dicere non dare*, I must proceed with the history of legislation in British India upon this subject. We find then, the provisions of Act V of 1840 were extended by s. 9 of Act

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XVIII of 1863 to the High Courts also, and the law stood so in 1872 when Act VI of 1872 was passed. The effect of that Act can best be represented in the words of Lord Hobhouse, who was then the Legal Member of the Viceroy's Legislative Council and is now one of the Lords of the Judicial Committee of Her Majesty's Privy Council. Referring to Act VI of 1872, he went on to say:—

"That Act introduced two very important alterations. One was this, that every witness who objected to take an oath might, instead, make a simple affirmation; and the other was that, notwithstanding any irregularity in the administration of any oath, or any irregularity in the making of an affirmation, or, in fact, any irregularity in the former method of taking evidence, the proceedings should be valid. Another alteration was introduced, probably of less importance, because Mr. Hobhouse imagined it applied only to a few cases. Act V of 1840, which was the Act that prohibited the administration of oaths to Hindus and Muhammadans, was modified in this way: it was provided that, if a witness was willing to take an oath in a form peculiarly binding upon his own conscience, it should be competent to the Court to administer such an oath. That was the present state of the law. The general rule, if anything could be called general which excepted Hindus and Muhammadans, remained the same as before. With regard to Hindus and Muhammadans, it was forbidden to administer oaths to them, except in those special cases in which witness himself was willing to take an oath; and it was provided that irregularity should not affect the validity of the proceeding."

Then came the present Indian Oaths Act (X of 1873) with which I am immediately concerned in this case. That Act by s. 6 maintained the solemn affirmation which had been substituted for oath by its predecessors, Act V of 1840 and Act VI of 1872, so far as Hindu and Muhammadan witnesses were concerned. The section provides that "where the witness, interpreter, or juror is a Hindu or Muhammadan, or has an objection to making an oath, he *shall*, instead of making an oath, make an affirmation;" and that "in every other case the witness, interpreter, or juror shall make an oath." S. 13 of the enactment in reproducing the

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provisions of s. 5 of Act VI of 1872 enunciates the following rule:—

"No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

The law stood thus, as indeed it stands now, when the case of *The Queen* v. *Anunto Chuckerbutty* (1) came before a Division Bench of the Calcutta High Court, and in that case the learned Judges (Kemp and Birch) held that s. 13 of Act X of 1873 does not render the evidence of a child of nine years of age inadmissible, if the evidence has been advisedly, and not by an omission, recorded without any oath or affirmation. A similar question arose in the case of *The Queen* v. *Sewa Bhogta* (2), in which a Full Bench of the same Court, consisting of Couch, C.J., and Kemp, Jackson, Phear and Markby, JJ., were concerned, and in which the Bench, with the exception of Jackson, J., laid down the rule that the word "*omission*" in s. 13 of Act X of 1873 includes any omission and is not limited to accidental or negligent omissions. Both these cases have been relied upon before me by the learned Public Prosecutor on behalf of the Crown, and I have no doubt that they support the case for the prosecution so far as the admissibility of the evidence of the girl Musmamat Thakuri is concerned.

But these rulings have been to me the main reason for having considered this question at such length. The broad question is whether in the case of a witness who by reason of tender age and by want of previous instruction has no conception of the obligations of an oath or solemn affirmation, whether with respect to the future life or as to the punishment for perjury, can give legal testimony in a judicial proceeding for purposes of adjudication. This question I shall consider now, because it is on the determination of this question that the case for the prosecution against the prisoner-appellant Fatteh almost entirely depends.

(1) 14 B. L. R., 295, note. (2) 14 B. L. R. 294.

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The practice of the English Courts is well stated in Roscoe's Criminal Evidence (p. 116):—

"Where a case depends on the testimony of an infant, it is usual for the Court to examine him as to his competency to take an oath previously to his going before the grand jury, and if found incompetent for want of proper instruction, the Court will, in its discretion, put off the trial in order that the party may, in the meantime, receive such instruction as may qualify him to take an oath. (Stark. Ev. 94, 2nd ed.) This was done by Rooke, J., in the case of an indictment for a rape, and approved of by all the Judges: 1 Leach, 430 (n); 2nd Bac. Ab. by Gwill. 577 (n). An application to postpone the trial upon this ground ought properly to be made before the child is examined by the grand jury, at all events before the trial has commenced, for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the Judge ought not to discharge the jury upon this ground: I Phill. Ev. 19, 10th ed., citing *R.* v. *Wade*, *post*, *tit*, *Practice*. There the witness was an adult, but the principle seems to apply equally to the case of a child. If a child is from want of understanding incapable of giving evidence upon oath, proof of its declaration is inadmissible: *R.* v. *Tucker*, 1808, M.S.; I Phill. Ev. (10), 10th ed., *Anon*, Lord Raym. cited 1 Atk. 29."

So far as the Indian Courts are concerned, the earliest trace of the practice appears from a circular order of the late Nizamat Adalat, No. I, dated 1st February, 1828, which has been published at p. 28 of *Skipwith's Magistrate's Guide*. The circular runs as follows:—

"Any children who may not appear to have a sufficient sense of the nature and obligation of an oath shall not be examined at all in any criminal trial; their depositions may, however, be taken in preliminary enquiries and be placed among the records of the office in which they may be taken, not as evidence in themselves, but to be used as a clue to evidence."

It does not appear how this provision could have had the force of law, but we find that the Legislature in passing Act II of 1855 made the following provision in s. 15 of that enactment:—

"Any person who, by reason of immature age or want of religious belief, or who, by reason or defect or religious belief, ought not,

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in the opinion of such Courts or persons, to be admitted to give evidence on oath or solemn affirmation, shall be admitted to give evidence on a simple affirmation, declaring that he will speak the truth, the whole truth, and nothing but the truth."

No provisions to this particular effect as to the immature age of the witness with reference to the conception of the obligation of an oath or solemn affirmation appear to have been reproduced either in the Oaths Act (VI of 1872) or in the present Oaths Act (X of 1873), and if there exists any definite legislative provision on the subject, it must be evolved out of s. 118 of the Evidence Act (I of 1872) or s. 13 of the Oaths Act (X of 1873).

The question, then, is what is the effect of these provisions of the law? In other words, does the law dispense with oath or solemn affirmation in the case of witnesses who, by reason of tender age and want of instruction, are totally incompetent either to comprehend the spiritual obligations of an oath or the temporal punishment awarded by the law in the cases of perjury?

To this question, as I have already said, the answer of the Calcutta Court is that omission to administer an oath or solemn affirmation does not vitiate the evidence of the witness even though such oath or solemn affirmation was deliberately omitted, and omitted not by accident or negligence, but because of the immature understanding of the witness for comprehending the solemnity of the oath or solemn affirmation.

It seems to me, with profound deference to the majority of the Calcutta Full Bench in the *Queen* v. *Sewa Bhogta* (1), that the rule therein laid down has the effect of virtually abolishing the whole of the principle of oaths and solemn affirmations as guarantees for securing true statements by witnesses. Indeed, such was the view taken in that case by an eminent Judge, Sir L. Jackson, who, in dissenting from the opinion of the majority of the Court, went on to say:—

"It seems to me that, in framing the 13th section of the Oaths Act, it was intended to obviate the effect of any evasion on the part of witnesses or mistake on the part of officers of the Court, and not to give a power to Judges or Magistrates to render the

(1) 14 B. L. R. 294.

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whole Act as it were ineffectual by perversely or erroneously ordering that witnesses should not take an oath or affirmation."

This is exactly the view which I hold in this case with reference to the statement made in the witness-box by the girl Musammat Thakuri, to whom neither an oath nor a solemn affirmation was administered, and deliberately not administered because the learned Judge found that she had not attained sufficient maturity to comprehend either the spiritual or temporal consequences or obligations of making a true statement in the witness-box. The question, then, is whether the girl's evidence is admissible in law for the purposes of this case. To use the words of Sir L. Jackson, "it seems to me, therefore, that the Judge in this case having been directed by law to examine the witness in question upon affirmation, and having determined that he would not administer such affirmation, the witness has been examined contrary to law, and the evidence is inadmissible." Whether oaths or solemn affirmations have any intrinsic utility is a question which it would be out of place to discuss here. All I need say is that the Indian Legislature has never yet accepted the entire theories of Jeremy Bentham on this point, and that to this day oaths and solemn affirmations are regarded by our law as guarantees against perjury: in other words as a means of securing ascertainment of truth. Nor is the case different in England, because even there encroachments upon the maxim *in judicio non creditur nisi juratis* have not gone so far as to dispense with the sanction of an oath or solemn affirmation. To illustrate this I will only read a passage from Taylor on Evidence, s. 1380 (8th ed.): "Again, though a Peer is privileged, while sitting in judgment, to give his verdict upon his honour and was also permitted, under the old law, to answer a bill in Chancery upon his protestation of honour, and not upon his oath, he cannot be examined as a witness in any cause, whether civil or criminal, or in any Court of justice, whether it be an inferior Court or the House of Lords, or in any manner, whether *vivâ voce*, or by interrogatories, or by affidavit, unless he be first sworn; for the respect which the law shows to the honor of a Peer, does not extend so far as to overturn the settled maxim, that *in judicio non creditur nisi juratis*. If, therefore, he refuses to take the necessary oath or affirmation, he will, notwithstanding the privi-

leges of peerage or of Parliament, be guilty of a contempt for which he may be committed and fined."

The history of the Indian legislation, as already stated by me, does not warrant the conclusion that the Legislature intended to make a radical departure in this respect. Indeed, the broad conclusions which I draw from the various changes which the Indian statute law has undergone on the subject are :—

First—that whilst the limit of age as to the competency of witnesses was removed, the general principle that they should be competent to give "rational answers" to questions was affirmed, as shown by s. 118 of the present Evidence Act (I of 1872);

Secondly—that the necessity of oaths or solemn affirmations was maintained and imperatively required, as shown by s. 6 of the Indian Oaths Act (X of 1873);

Thirdly—that omissions or irregularities in the administration of oaths or solemn affirmations were to be overlooked in certain cases contemplated by s. 13 of the Indian Oaths Act (X of 1873).

Adopting the opinion, as I have done, of Sir L. Jackson, I cannot but hold that the statements made by Musammat Thakuri in the witness-box were not admissible as evidence. The words of s. 6 of the Oaths Act (X of 1873) seem to me to be not merely directory but imperative, and I hold this view because the object of the statute naturally aims at security of justice and guarantees as to the liberty of the subject. I believe that this is the manner in which statutes of this description are interpreted by Courts of justice in England. To say, then, that the object of s. 13 of the Oaths Act (X of 1873) was to practically nullify the whole of the enactment itself is a proposition which, with profound respect for the majority of the Full Bench of the Calcutta High Court, I find myself unable to accept. And my difficulty in endeavouring to accept that proposition is in no small degree enhanced by the fact that the very next clause of that same statute, *viz.*, s. 14, provides that "every person giving evidence on any subject before any Court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject;" and whilst s. 191 of the Indian Penal Code provides that "whoever

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being legally bound on an oath or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence," s. 193 of the same enactment provides a punishment of seven years' imprisonment. How a person who, by reason of tender years is unable to comprehend either the spiritual or the legal obligations of an oath or solemn affirmation can be regarded as competent to give evidence legally admissible, and to be understood to be liable to such penalties under the law, is a matter the reasons wherefor I find myself unable to conceive. Yet such is the practical effect of the ruling of the majority of the Court in the Calcutta Full Bench case; and with all the respect which I feel is due to such an authority, I cannot help feeling that if the principles of oaths and solemn affirmations were intended to be repudiated by the Legislature, the simplest course would have been, not to have passed a statute such as the Indian Oaths Act (X of 1873), but to have simply repealed the earlier enactments which required oaths or affirmations as a condition precedent to admissibility of the evidence of witnesses in judicial proceedings.

In the case now before me the case against the prisoner appellant Fatteh depends entirely, as the learned Sessions Judge points out, upon the evidence of the girl Musammat Thakuri, to whom neither an oath nor a solemn affirmation was administered, for the simple reason that she had not attained sufficiently mature intelligence to comprehend the spiritual sanctity or legal obligations of an oath or solemn affirmation.

Holding this view of the law as to the inadmissibility of Musammat Thakuri's evidence, it is not necessary for me to say what degree of credit I would attach to her statement as a matter of weighing the evidence in the circumstances of this case. I need only repeat what has been said by Blackstone in his Commentaries on the English Law that "where the evidence of children is admitted, it is much to be wished, in order to render it credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact, and that the conviction should not be grounded solely on the unsupported testi-

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mony of an infant under years of discretion." And because in this case the evidence against the prisoner-appellant Fatteh is inadmissible in law, I hold that the prosecution has failed to make out the case against him I therefore decree his appeal and setting aside the conviction and sentence passed upon him, direct that he be released.

As to the prisoner-appellant Maru I have already said enough to indicate that there is sufficient evidence, irrespective of the statements of the girl Musammat Thakuri, to warrant his conviction. The provisions of s. 167 of the Evidence Act (I of 1872) therefore apply to his case, and I dismiss his appeal and confirm the conviction and sentence passed upon him.

FULL BENCH.

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January 23.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

MUHAMMAD HUSAIN AND OTHERS (DEFENDANTS) *v.* KHUSHALO (PLAINTIFF.)*

Civil Procedure Code, ss. 32, 365, 366, 367, 368, 582, 587—*Death of plaintiff-respondent pending appeal—Substitution of alleged legal representative on her own application—Application by defendants-appellants to substitute another person as true legal representative—Power of Court to determine which of such persons is the true legal representative.*

In a suit for declaration of title to, and for possession of, a share in alleged ancestral property with mesne profits, the plaintiff obtained a decree in the lower appellate Court from which the defendants appealed to the High Court. Pending the appeal, the plaintiff died childless, and, on her application, his widow was substituted for him as respondent. Subsequently the defendants-appellants applied to the High Court to have the deceased's father brought upon the record as respondent, alleging that he, and not the widow, was the deceased's legal representative and solely entitled to be placed on the record as such. The father made no objection to the proposed substitution. It was common ground that either the father alone or the widow alone was the deceased plaintiff-respondent's true legal representative.

Held by the Full Bench (MAHMOOD, J., dissenting) that, having regard to the words "as nearly as may be" and "as far as may be" in s. 582 of the Civil Procedure Code, ss. 365, 366, and 367 might be applied, at all events analogically, to the case so as to enable the real legal representative of the deceased plaintiff-respondent to be ascertained and brought upon the record; that the latter portion of s. 582 did not limit the

* Second Appeal No. 1800 of 1885, from a decree of W. R. Barry, Esq., Distr ct Judge of Aligarh, dated the 15th June, 1885, reversing a decree of Maulvi Samiull h Khan, Subordinate Judge of Aligarh, dated the 30th June, 1883.

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earlier words of the section so as to make s. 368 the only provision applicable to the case; that a Court of record must have an inherent power to ascertain whether or not it has before it the proper parties to an appeal if the question be substantially raised; and that, therefore, the Court could and should, either before or at the hearing of the appeal, ascertain and determine for the purposes of the prosecution of the appeal the preliminary question whether the father or the widow was the legal representative of the deceased, and should act accordingly.

Held also by the Full Bench (MAHMOOD, J., dissenting) that s. 32 of the Code did not apply to the case, and that if it did apply, it would be the duty of the Court to decide whether the father or the widow was the legal representative of the deceased plaintiff-respondent.

Held by MAHMOOD, J., *contra*, that the effect of s. 582 read with s. 587 was to place the defendants-appellants in the position of plaintiffs and the deceased respondent in that of a defendant for the purposes of array of parties; that consequently the provisions of ss. 363, 364, 365, 366, and 367 had no application; that, applying s. 368, the Court was bound to implead the person named by the defendants-appellants as a respondent to the appeal; that, applying s. 32, the widow occupied a position which gave her a sufficient *primâ facie* status to be impleaded as respondent; and that as there existed no authority in the Code allowing the Court to hold an enquiry whether the father or the widow was the true legal representative of the deceased plaintiff-respondent, the Court should bring both upon the record as respondents and proceed to decide the appeal after hearing both.

Narain Das v. *Lajja Ram* (1), *Har Narain Singh* v. *Kharag Singh* (2), *Lakshmibai* v. *Balkrishna* (3), *Rajmonee Dabee* v. *Chunder Kant Sandel* (4), *Naraini Kuar* v. *Durjan Kuar* (5) and *Athiappa* v. *Ayanna* (6) referred to.

The plaintiff in this case, Dipchand, a member of a joint Hindu family, sued Muhammad Husain and others for a declaration of title to and possession of a one-sixth share of alleged ancestral family property, namely, a three biswas share of mauza Pekhiani with mesne profits. The defendants had purchased the rights and interests of the plaintiff's grandfather, Duli, in the property at a sale in execution of a simple money decree which was dated the 19th March, 1860.

The plaintiff alleged that this decree "was not for a debt contracted for the benefit of the family, and therefore the sons and grandsons were not bound to satisfy it, nor were their shares in the ancestral property transferable in satisfaction thereof." The plaintiff was born about three months after the passing of the decree, and the ancestral property was sold about fifteen months

(1) I. L. R., 7 All. 693.
(2) I. L. R., 9 All. 417.
(3) I. L. R., 4 Bom. 654.
(4) I. L. R., 8 Calc. 440; 10 Calc. L. R. 437.
(5) I. L. R., 2 All. 738.
(6) I. L. R., 8 Mad. 300.

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after the plaintiff's birth. The Court of first instance (Subordinate Judge of Aligarh) on the 30th June, 1883, dismissed the suit on the ground, *inter alia*, that the debt for which the property had been sold was one in respect of which the whole family estate was liable. On appeal by the plaintiff, the District Judge of Aligarh on the 15th June, 1885, held that the plaintiff's interest in the property did not pass by the sale to the defendants, and gave him a decree for possession of the share claimed.

On the 9th December, 1885, the defendants appealed to the High Court. On the 7th May, 1886, while the appeal was pending, the plaintiff, Dipchand, died, and on the 17th July, 1886, his widow, Musammat Khushalo, was, on her application dated the 30th June, 1886, made respondent in his place by an order of Straight, J. The appeal came for hearing before Oldfield and Mahmood, JJ., when it was contended for the appellants that the appeal should be decreed and the suit dismissed, as on the death of Dipchand the right to sue did not survive. The Division Bench referred the questions involved in this contention to the Full Bench for decision; and the Full Bench held that the benefit of the lower appellate Court's judgment would survive to the legal representative of the deceased plaintiff, expressing no opinion whether such representative could enforce the whole of the judgment or not (1).

On the 2nd July, 1886, the following application was made by Pandit *Sundar Lal* on behalf of the defendants-appellants:—"In the above case the respondent died on or after the 5th May, 1886. He has left no issue. He was living with his father Sita Ram, and, so far as the petitioners know, Sita Ram, his father (if anybody is at all), is heir and legal representative to the deceased respondent. It is therefore prayed that the name of Sita Ram be entered on the record as respondent in place of the deceased respondent."

On the 25th March, 1887, the appeal came for hearing before Edge, C. J., and Mahmood, J. It was contended on behalf of the defendants-appellants that Khushalo had been wrongly substituted as respondent by the order of the 17th July, 1886, and that the proper person to be substituted as the legal representative of the deceased Dipchand was his father Sita Ram. It was agreed be-

(1) I. L. R. 9 All. 131.

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tween the parties that either Sita Ram alone or Khushalo alone was the true legal representative of the deceased. No objection was raised on behalf of Sita Ram to the effect that he was not the legal representative of Dipchand.

With reference to this contention and with the consent of the parties the Division Bench ordered that the appeal and the application made by the defendants-appellants on the 2nd July, 1886 to substitute Sita Ram as respondent should be heard together by a Full Bench of the Court. The appeal came for hearing before the Full Bench on the 4th April, 1887.

The Hon. Pandit *Ajudhia Nath*, for the appellants.—Dipchand was a member of a joint Hindu family, and his widow could have no interest beyond a right to maintenance. We do not, however, object to the widow remaining on the record as respondent so long as the deceased's father, Sita Ram, who is the true legal representative, entitled to execute the lower appellate Court's decree, is added.

[Mr. *C. H. Hill*, for Musammat Khushalo.—This is a complete change of front. Till now it has always been contended on the other side that Khushalo was wrongly added as respondent and that Sita Ram should be substituted for her.

EDGE, C. J.—I do not see how two respondents with divergent interests can both remain upon the record, or how in that case the Court's decree could be executed.]

Then I say that Khushalo's name should be struck out. Under s. 587 of the Code the provisions of s. 582 apply to this appeal. By reason of s. 582, Chapter XXI applies to the case and also ss. 28 and 32. These sections show that the parties are in a different position in appeal from that which they occupied in the original suit, and that for the purposes of substitution of parties the defendants-appellants should be treated as plaintiffs. If I am wrong, then s. 367 applies, and the Court may either now itself determine who is the legal representative of the deceased plaintiff or stay proceedings until the fact has been determined in another suit.

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[MAHMOOD, J.—Why should you implead any one as respondent? Does not *Narain Das* v. *Lajja Ram* (1) decide that if you do not do so your appeal will not abate?]

The Full Bench in that case did not deny that we were at liberty to apply for substitution if we chose to do so. The limitation for such an application is that provided by art. 178 of the Limitation Act.

[EDGE, C. J.—*Narain Das* v. *Lajja Ram* (1) only decided that the appeal would not abate if the defendant-appellant did not apply for substitution within sixty days from the death of the plaintiff-respondent. It did not decide that the defendant-appellant could proceed with the appeal without any respondent being added. If the appeal succeeded, how and against whom could it be drawn up or executed?]

It is difficult to answer that question, having regard to the decision of the Full Bench. My chief difficulty is caused by the wording of art. 171B of the Limitation Act, which omits all reference to the death of a respondent. The view expressed by Straight, J., in reference to that article has been concurred in by the Calcutta High Court in *Udit Narain Singh* v. *Harogouri Prosad* (2) and by the Madras High Court in *Lakshmi* v. *Sri Devi* (3). S. 582 of the Code does not necessarily prevent the application of s. 367 to this case. The words "so far as may be" and "include" (not "mean") show that a plaintiff-respondent may be treated either as a plaintiff or as a defendant as occasion requires. I contend, therefore, that, reading together ss. 368 and 582, we are entitled to have Sita Ram placed on the record as respondent; and that, if not, under s. 367 the Court has power to decide whether Sita Ram or Khusi is the true legal representative of Dipchand.

Mr. *C. H. Hill*, for Musammat Khushalo.—Our application was made under s. 365 of the Code within the time limited. The second paragraph of s. 366, therefore, does not apply, and the Court has no power to allow any application on behalf of the defendants for adding another person as legal representative.

[MAHMOOD, J., referred to *Lakshmibai* v. *Balkrishna* (4).]

(1) I. L. R., 7 All, 603.
(2) I. L. R., 12 Calc. 590.
(3) I. L. R., 9 Mad. 1.
(4) I. L. R., 4 Bom. 661.

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The Legislature in framing s. 582 of the Code did not intend that an appellant should occupy the position of a plaintiff and a respondent that of a defendant absolutely. In *Narain Das* v. *Lajja Ram* (1), the only question was whether the appeal had abated because no application was made within sixty days after the respondent's death. Everything in the judgments relating to other questions is *obiter*. A plaintiff does not cease to be plaintiff after an appeal has been instituted. The effect of s. 582 is not that the word "plaintiff" is to be read out of s. 365, but that the word "appellant" is to be read into that section when necessary. S. 367 only applies to cases arising under s. 366, that is to say, to cases where no application has been made within time by the legal representative of the deceased plaintiff. On general principles the sections relating to the death of a plaintiff ought to be held applicable to plaintiffs even after the institution of an appeal in which the plaintiff is respondent. The appeal is virtually a re-hearing. From beginning to end the question is whether the plaintiff's suit shall succeed or not. The appeal merely gives a second opportunity to the defendant.

[MAHMOOD, J.—Take the analogy of the House of Lords, where the appeal abates upon the death of either party pending appeal, and the practice is to obtain an order of revivor. The representative of the plaintiff-respondent would not apply for revivor; having his decree, he would not be interested in making such an application. It would be made by the defendant-appellant, who wanted to get rid of the decree.]

Here the appeal does not abate and the analogy would not hold good. The words in s. 582 "as far as may be" mean so far as may be necessary for the purposes of justice. Surely it would defeat the ends of justice to forbid the person who holds the decree of the first Court to obtain the benefit of it, and to allow the defendant-appellant who has lost in the Court below to appoint any person he pleases to support the lower Court's decree.

[EDGE, C. J.—Supposing that we refused to allow the defendants' application and set aside the lower Court's decree, and your client turned out not to be the true legal representative of Dipchand, the real legal representative would not be bound by our decision, nor would the lower Court's decree hold by the real

(1) I. L. R., 7 All. 693.

legal representative be in any way affected. In that case, assuming the appellant to have acted under a *bonâ fide* mistake, is he to bring a fresh appeal? Such an appeal might be out of time. It comes to this: either an appellant who succeeded against a wrong respondent might get execution under s. 583, or he might lose his appeal altogether by the respondent being brought on the record against his will.]

I contend that s. 365 applies and that, therefore, ss. 366 and 367 (which must be read together and which refer only to cases where no application under s. 365 has been made within time) do not apply; but if the Court should rule otherwise, then I ask it to determine the question at issue under s. 367.

The Hon. Pandit *Ajudhia Nath*, for the appellants in reply.—S. 365 does not apply. We deny that Khushalo is the "legal representative" of the deceased. We can apply either under s. 366 or under s. 368. The word "or" in s. 366 should be read disjunctively from the preceding words, and the second paragraph of that section is not limited to cases where no application has been made by the representative of a deceased plaintiff.

EDGE, C. J., and STRAIGHT, BRODHURST, and TYRRELL, JJ.—In this case one Dipchand brought a suit against Khwajah Muhammad Husain and others, in which he claimed a declaration of title to a share in alleged ancestral property in mauza Pekhlani, possession and mesne profits. It is not necessary on the present occasion to consider the questions raised by the defendants in defence. Dipchand's suit was, on the 30th of June, 1883, dismissed by the then Subordinate Judge of Aligarh. From that decree Dipchand appealed, and on the appeal the officiating Additional Judge of Aligarh, on the 15th of June, 1885, made a decree in favour of Dipchand for proprietary possession of the share claimed by him, for Rs. 624 profits against the defendants, with costs in both Courts, and for mesne profits from the date of the institution of the suit to the date of the delivery of possession of the share. From that decree the defendants brought an appeal under s. 584 of the Code of Civil Procedure to this Court.

After the appeal to this Court had been filed, Dipchand, who was the respondent, died childless. After the death of Dipchand

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his widow, Musammat Khushalo, was on her own application brought upon the record as the legal representative of the deceased respondent, Dipchand. Subsequently the appellants applied to the Court to have Sita Ram, the father of Dipchand, brought upon the record as the legal representative of Dipchand, alleging that Sita Ram and not Musammat Khushalo was the heir and legal representative of the deceased respondent, and contending that Sita Ram, and he only, should be on the record as the legal representative of the deceased respondent. Sita Ram has not objected, and we understand that he does not intend to object that he is not the legal representative of the deceased respondent. As it appeared to the Judges composing the Bench before which the appeal then was, and to which the application was made, that the application of the appellants raised questions of great importance upon which those Judges were not agreed, it was, with the consent of the parties, ordered that the appeal and the application of the appellants should be heard by the Full Bench. The application of the appellants has been heard by the Full Bench, and as it raised questions to be decided preliminary to the consideration of the appeal, upon which questions the Full Bench was not agreed, we took time to consider our judgments.

On the part of the appellants it has been contended that as they allege that Sita Ram is the legal representative of the deceased respondent, Dipchand, and as they desire that Sita Ram should be made the respondent to the appeal in the stead of the deceased respondent, they are entitled by virtue of ss. 368 and 582 of the Code of Civil Procedure to have the Court enter the name of Sita Ram as that of the legal representative of the deceased respondent upon the record in the place of the deceased respondent and to the exclusion from the record of Musammat Khushalo, and this without the question being considered as to whether Sita Ram or Musammat Khushalo is in fact the legal representative of the deceased respondent. It is common ground that the legal representative of the deceased respondent is either Sita Ram or Musammat Khushalo, and that both of them are not legal representatives of the deceased respondent. On the part of Musammat Khushalo it has been contended that she is entitled to show that she and not Sita Ram is the legal representative, and, as such, the only person

to be on the record as the legal representative of the deceased respondent ; and in any event, that as her name has been entered upon the record as that of the legal representative of the deceased respondent, her name cannot now be removed from the record, and that she is entitled to be heard upon the appeal.

It has been contended that the question has been concluded by the ruling of the Full Bench of his Court in the case of *Narain Das* v. *Lajja Ram* (1). The point decided by the majority of the Court in that case was that the appeal of a defendant-appellant does not abate by reason only of his omission within sixty days of the death of a plaintiff-respondent to make application to the appellate Court for bringing on the record the legal representative of the deceased plaintiff-respondent; or in other words, that arts. 171, 171A. and 171B. of the second schedule of the Indian Limitation Act, 1877, do not apply to such a case. An examination of the order of reference shows that that, and that only, was the question referred to the Full Bench for decision. The judgment of Straight, J., in that case, at page 697, shows expressly what he considered, and we think rightly, to be the sole question before the Full Bench. In the course of his judgment he said: "The whole question which we have to consider is whether, in a case where a plaintiff-respondent has died, and the defendant-appellant has failed to make an application that the name of the plaintiff's legal representative be entered on the record as respondent in his place, the appeal in consequence of such failure abates." It is true that in their opinions recorded in that case Petheram, C. J., and Mahmood, J., gave expression to certain *obiter dicta*.

Petheram, C. J., thought that the provisions of s. 368 of the Code of Civil Procedure are "inapplicable to the case of a defendant-appellant who claims no debt or damages, but only to have a decree which has been passed against him reversed." This expression of opinion of the learned Chief Justice may, in our opinion, be treated as *obiter*. He also held, and this was the question in the reference, that the word "defendant" in art. 117B. of the second schedule of the Indian Limitation Act must be construed strictly as defendant only and is not to be read as "including a respondent," *non obstante* the language of s. 582 of the Code of

(1) I. L. R., 7 All. 693.

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Civil Procedure. On the other hand it was held by Mahmood, J., at pages 700 and 701, that "the word 'defendant,' therefore, as it occurs in art. 171B. of the Limitation Act, must be taken to include a respondent, and there is nothing to suggest that any distinction is intended between a plaintiff-respondent and a defendant-respondent. Now there is one more consideration in favour of my view. There is nothing, either in the Civil Procedure Code or in the Limitation Act, which provides for or imposes the duty on the legal representative of a deceased respondent (whether plaintiff or defendant in the original action) to apply to the Court for having his name placed on the record in substitution for the deceased party. It is unnecessary to determine whether such an application could be entertained, and, if so, what limitation would govern such an application."

The Full Bench of the High Court at Calcutta in the case of *Udit Narain Singh* v. *Harogouri Prasad* (1) to which reference was made in the argument, decided only that the word "defendant" in art. 171B. of the second schedule of the Indian Limitation Act does not include a respondent, and expressed the opinion that s. 582 of the Code of Civil Procedure was intended to affect only proceedings under that Code.

In *Lakshmi* v. *Sri Devi* (2) the question before the Full Bench of the High Court at Madras was whether art. 171B. of the second schedule of the Indian Limitation Act applied to the case of a deceased respondent to an appeal. The questions which we have to consider are not questions which it was necessary to consider in any of the Full Bench cases to which we have referred.

S. 582 of the Code of Civil Procedure enacts that "the appellate Court shall have, in appeals under this chapter, the same powers, and shall perform, as nearly as may be, the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under chapter V; and in chapter XXI, so far as may be, the words 'plaintiff,' 'defendant,' and 'suit' shall be held to include an appellant, a respondent, and an 'appeal, respectively, in proceedings arising out of the death, marriage, or insolvency of parties to an appeal. The provisions

(1) I. L. R., 12 Calc. 590. (2) I. L. R., 9 Mad. 1.

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hereinbefore contained shall apply to appeals under this chapter, so far as such provisions are applicable."

The first point to be noticed is that, in appeals under chapter XLI of the Code, the appellate Court has and can "perform, as nearly as may be, the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted under chapter V." The words which we have just quoted, unless there be something in the section to limit their application, confer and impose upon an appellate Court very wide powers—powers the conferring of which, we think, impliedly authorises, even if the words do not expressly authorise us, as an appellate Court, to decide for the purposes of the prosecution of this appeal, or to have it determined by an independent suit, whether Sita Ram or Musammat Khushalo is the legal representative of the deceased respondent as a preliminary question.

If the words in s. 582 "and in chapter XXI, so far as may be, the words 'plaintiff,' 'defendant,' and 'suit' shall be held to include an appellant, a respondent, and an appeal, respectively, in proceedings arising out of the death," &c., mean or are to be read as "provided that in chapter XXI, so far as may be, for the words 'plaintiff,' 'defendant,' and 'suit' shall be read appellant, defendant, and appeal, respectively, in proceedings arising out of the death," &c., then undoubtedly the earlier words of the section are limited, and s. 368 of the Code is the only section which applies to the case, and with some startling possible results in cases in which a plaintiff-respondent has died pending an appeal.

To take a possible case, a defendant appeals against a decree passed against him. Afterwards, and before the appeal has come on for hearing, the respondent dies, and in the meantime the appellant has obtained, as here, a stay of execution. The appellant, we will assume, knows that he has no case in appeal and has appealed only to gain time. If s. 368 is the only section which applies, what is there to prevent such an appellant *nominating as the legal representative* of the deceased respondent a creature or friend of his with whose collusive assistance he could postpone upon one pretext or another the hearing of the appeal, and so keep the true legal repesentative of the deceased respondent out of the fruits of the decree which

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the deceased respondent had obtained below? If s. 368 alone applies, such an appellant need only make an application to the Court, specifying the name, description, and place of abode of *any person whom he alleges to be the legal representative of the deceased respondent* and whom he desires to be made the respondent in his stead. The actual legal representative of the deceased respondent could not, if s. 368 alone applies, get upon the record, and would not be entitled to be heard; and could not even inform the appellate Court with any effect that it was proceeding with the hearing of an appeal in which it had not before it the proper parties to the litigation. In such a case the actual legal representative of a deceased respondent might have in his hand the probate of the will in his favour of the deceased respondent granted by the very appellate Court before which the appeal was pending ready to be produced to the Court; and might be able to show by the very record of the case under appeal that it was an undisputed fact that the person nominated by the appellant was not, and could not be, the legal representative of the deceased respondent, and that he, the applicant, was the legal representative. Is the Court in such a case to add a mere dummy to the record and proceed, with the knowledge of that fact, to go through the farce of hearing and determining an appeal in which the Court is aware that the decree which it may pass can have no binding effect upon the real representative of the deceased respondent? We cannot come to the conclusion that the Legislature intended to compel a High Court, or any other Court, to waste its time in the hearing and determining of an appeal, its decree in which the Court knows, or has the means, if it may apply them, of knowing, can have no possible binding effect upon the legal representative of the deceased respondent. We must put a reasonable interpretation upon the Act and assume that the Legislature, or those who may have been responsible for the framing of s. 582 of the Code, intended at the time when that section was framed to facilitate and not to obstruct the administration of the law and of justice. In our opinion, this Court, as the appellate Court dealing with this appeal and the application of the appellant, has the power to ascertain under the circumstances, as a preliminary question, whether Sita Ram or Musammat Khushalo is, for the purposes of the decree which it may have to pass, the legal representative of the deceased respondent.

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If we are mistaken as to the extent of our power, it will be easy for the Legislature, in the contemplated Bill for amending the Code of Civil Procedure, to enact that an appellate Court must, in the case of the death of a respondent, bring upon the record, as the representative of such deceased respondent, any person who does not object and who is nominated by the appellant, and such person only, notwithstanding that it appears to it that such person is not, and cannot be, the legal representative of the deceased respondent, and notwithstanding that the actual legal representative of the deceased respondent desires to be brought upon the record to protect his interests under the decree appealed against (1). Probably such a question as the present could not have arisen if the powers which an appellate Court should exercise had been in the Code specifically dealt with and not by reference.

It has been suggested on the authority of the case of *Athiappa* v. *Ayanna* (2), and our brother Mahmood so considers, that s. 32 of the Code of Civil Procedure would apply to this case. We may say, with all deference to the opinion of our brother Mahmood, that in our judgment s. 32 does not apply ; and if it does apply, then that it is the duty of the Court to decide whether Sita Ram or Musammat Khushalo is the legal representative of the deceased respondent. The material part of that section, so far as this question is concerned, is as follows :—

" And the Court may at any time, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence

(1) Act VII of 1888 (" An Act to amend the Code of Civil Procedure, the Indian Registration Act, 1877, and the Indian Limitation Act, 1877") received the assent of the Governor-General on the 23rd March, 1888, and will come into force on the 1st July, 1888. S. 32 (3) provides as follows :—" To s. 368 the following shall be added, namely : The legal representative of a deceased defendant may apply to have himself made a defendant in place of the deceased defendant, and the provisions of this section, so far as they are applicable, shall apply to the application and to the proceedings and consequences ensuing thereon." S. 53 (1) provides as follows :—" In s. 582, for the words ' the words plaintiff, defendant, and suit shall be held to include an appellant, a respondent, and an appeal, respectively" the following shall be substituted namely, ' the word plaintiff shall be held to include a plaintiff-appellant or defendant-appellant, the word defendant a plaintiff-respondent or defendent-respondent, and the word suit an appeal.' "

(2) I. L. R., 8 Mad. 300.

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before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

It could not be suggested that under that section, if it applied, a person who is not the legal representative of the deceased respondent is "a person who ought to have been joined" as the legal representative of the deceased respondent. Nor, in our opinion, could such a person who has no interest whatsoever, representative or otherwise, in the suit or in the appeal, be said to be in any sense "a person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit" or in the appeal. If it be contended that such a person is a necessary party to the appeal, it can only be on the ground that one of the questions which the appellate Court has to adjudicate upon is as to whether or not he is, as in this case, the legal representative of the deceased respondent. If that were a question to be adjudicated upon and settled in the appeal, it would be the duty of the Court to decide the question, and not, as we infer is our brother Mahmood's opinion, to leave it undecided. To leave it undecided would be, in our opinion, to show that such a person was not a necessary party to the appeal.

If Sita Ram is to be brought on the record as the legal representative of the deceased respondent, and if Musammat Khushalo is to remain on the record also as the legal representative of the deceased respondent, which of them is entitled to be heard in support of the decree below? As the deceased respondent has admittedly only one legal representative, on what principle or rule of practice should we hear two persons as his legal representatives in argument on the appeal? And further, what is the decree which the Court should make in case we dismiss the appeal? The decree in such a case, if we are not to ascertain which of those two persons is the legal representative of the deceased respondent, would be dismissed with costs to the respondents. It would be unjust to dismiss it with a double set of costs—one set for the respondent who was not brought upon the record at the instance or with the consent of the appellants, and the other set for the respondent who was brought on the record on the appli-

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cation of the appellants. If the appeal be one which ought to be dismissed with costs, the only course for the Court to adopt would be to dismiss the appeal with one set of costs to the respondents; and in that event the real legal representative, instead of getting one full set of costs, would only get a share in the full set. It cannot be doubted on the authorities that the decree to be executed would be the decree of this Court. How could it be executed? It may be doubted whether s. 231 of the Code of Civil Procedure was intended to apply to such case. If Sita Ram be the mere creature of the appellants—we do not say that he is—he would not join in an application for the execution of the decree, nor would he apply for the execution of the decree for the benefit of himself and Musammat Khushalo. If Musammat Khushalo applied for execution of the decree for the benefit of herself and Sita Ram, what would be the interests of Sita Ram which it would be necessary for the Court by its order under s. 231 to protect? They would in fact be the interests not of Sita Ram but of the appellants, and the protecting of the interests of Sita Ram would in effect deprive Musammat Khushalo of a moiety of the costs to which, if she be the legal representative of the deceased respondent, she would be entitled. S. 32 of the Code of Civil Procedure was considered by a Bench of this Court in the case of *Har Narain Singh* v. *Kharag Singh* (1), and the corresponding section of Act X of 1877 was considered by a Bench of this Court in the case of *Naraini Kuar* v. *Durjan Kuar* (2). We dissent from the view taken by the High Court at Madras in *Athiappa* v. *Ayanna* (3) and are of opinion that s. 32 of the Code does not apply to a case like this. We have pointed out what might be the result of holding that we have no power to have determined in another suit the question of which of these two persons, Sita Ram and Musammat Khushalo, is the legal representative of the deceased respondent, or to decide that question for the purposes of the prosecution of this appeal.

Different considerations arise in the case of the death of a defendant before decree in the Court of first instance. A person does not as a rule bring an action against another person unless he has, or believes he has, a cause of action; and in the case of the death of his defendant before decree, he would not, except

(1) I. L. R., 9 All. 447. (2) I. L. R., 2 All. 738.
(3) I. L. R., 8 Mad. 300.

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through mistake, nominate, under s. 368 of the Code, as the legal representative of his deceased defendant, a person who did not represent his deceased defendant or his estate. If he did, no possible harm could come to the real legal representative of the deceased defendant, except possibly having to show in subsequent proceedings that he was the legal representative. A plaintiff would make such an application at his own risk, and he may be safely left to put upon the record his nominee as the legal representative of the deceased defendant. But the case is otherwise when a person claiming to be the real legal representative of a deceased respondent desires to be put on the record to protect the decree obtained by the deceased respondent, and to obtain the fruits of that decree as speedily as possible. If a judgment-debtor dies before the decree has been fully executed, the holder of the decree must, under s. 234 of the Code, "apply to the Court which passed it to execute the same against the legal representative of the deceased." In that case the decree-holder would have to satisfy the Court, either by proof or admission, that the person whom he proposed to proceed against was the legal representative of the deceased judgment-debtor. An appellant would have no greater difficulty in ascertaining who is the legal representative of the deceased respondent and bringing him before the Court than would a decree-holder have in ascertaining who was the legal representative of his deceased judgment-debtor and bringing him before the Court. Ss. 365, 366, and 367 of the Code may, in our opinion, having regard to the words "as nearly as may be" and "as far as may be" in s. 582, be held to be applicable and be applied, in any event analogically, to this case to enable the real legal representative of the deceased respondent to get or be brought upon the record, and to enable this Court to ascertain whether Sita Ram or Musammat Khushalo is the legal representative of the deceased respondent, and, as such, entitled to be heard in support of the decree obtained below. Assuming for the moment that there are no words in s. 582 to support the view we hold and have expressed, we would be prepared to hold that there must be an inherent power in a Court of record to ascertain whether or nor it has before it the proper parties to a first or second appeal if the question be substantially raised. It is clear to us that when a respondent to an appeal has died, there

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can be no hearing and determining of the appeal that can have a binding effect upon the legal representative of such deceased respondent if such legal representative be excluded from the record without having been heard to show, if he can, that he is the legal representative; and it is equally clear to us that an appellate Court is not bound to hear and determine an appeal in which it has not on the record a respondent. In the latter case, it would not be contended that any decree which might be passed, except one dismissing the appeal, would be other than fruitless. So far as the legal representative of a deceased respondent or the estate of a deceased respondent would be concerned, we can see no difference between a case in which the legal representative who applies to be put on the record is excluded from the record without having been heard and one in which there is no respondent in appeal on the record. We may observe that the High Court at Bombay in *Lakshmibai* v. *Balkrishna* (1) and the High Court at Calcutta in *Rajmoonee Dabee* v. *Chunder Kant Sandel* (2) considered that they might in those cases apply the principle of analogy. We have had the opportunity of considering the draft judgment of our brother Mahmood and the cases referred to in it. We regret that we cannot agree with that judgment. In our opinion we can and should, either before or at the hearing of this appeal and as a preliminary question, ascertain and determine for the purposes of the prosecution of this appeal the question as to whether Sita Ram or Musammat Khushalo is the legal representative of the deceased respondent, and should act accordingly.

MAHMOOD, J.—The preliminary question which requires determination in this case has arisen from the following facts:—On the 20th of December, 1881, one Dipchand sued the present defendants-appellants for possession of certain zamíndári shares together with mesne profits. The suit was dismissed by the Court of first instance on the 30th June, 1883, and from that decree an appeal having been preferred by Dipchand, the lower appellate Court, reversing the decree of the first Court, decreed the claim on the 15th June, 1885. From that decree the defendants preferred this appeal on the 9th December, 1885, and the appeal was admitted and is still pending in this Court. On or about the 5th May, 1886

(1) I. L. R., 4 Bom. 654. (2) I. L. R., 8 Calc. 440; 10 Calc. L. R., 427.

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the plaintiff-respondent died childless, leaving his father, Sita Ram, and a widow, Musammat Khushalo, and it does not appear whether there is any other person claiming to be the legal representative of the deceased. On the 30th June, 1886, an application was presented to this Court by Musammat Khushalo, claiming to be the legal representative of the deceased and praying that her name might be substituted as respondent to the appeal, and this prayer was granted by order of my brother Straight on the 17th July, 1886. On the 2nd July, 1886, an application was made on behalf of the defendants-appellants, stating that the respondent, Dipchand, died childless on or after the 5th May, 1886, and that, so far as the defendants-appellants (petitioners) were aware, the sole heir of the deceased was his father, Sita Ram, and praying that his name might, therefore, be substituted for the deceased as respondent to this appeal. This application has not yet been granted, and has given rise to one of the points which require determination in this case. The appeal originally came on for hearing before a Division Bench of the Court consisting of Oldfield, J., and myself, and, for the reasons stated in the order of 30th July, 1886, the Bench referred the case to the Full Bench for consideration of the legal effect of Dipchand's death as to the question whether the cause of action survived in favour of his legal representative. The question was decided in the affirmative by the Full Bench, and the appeal coming on for hearing before the learned Chief Justice and myself, it was contended on behalf of the defendants-appellants that Musammat Khushalo had been wrongly substituted as respondent to the appeal, and that the proper person who should have been substituted as the legal representative of the deceased Dipchand was his father, Sita Ram, whom the defendants-appellants had by this application sought to implead as respondent to the appeal. In view of the points raised by this contention, the learned Chief Justice, by his order of the 25th March, 1887, directed that the case was to be heard by a Full Bench of this Court. The case has accordingly been heard by the whole Court so far as the preliminary question is concerned, and in dealing with that question it is necessary with reference to the arguments addressed to us at the bar, to consider the following points :—(1) Whether the order of 17th July, 1886, whereby Musammat Khushalo's

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name was brought upon the record as the legal representative of the deceased plaintiff-respondent, Dipchand, can be interfered with by us at this stage. (2) If so, whether she has been rightly brought upon the record as such representative, and should occupy that position for the purposes of this appeal, notwithstanding the objection of the defendants-appellants. (3) Whether the defendants-appellants are either required by law or entitled to make the application whereby they pray that the name of Sita Ram may be brought upon the record as the sole legal representative of the deceased plaintiff-respondent, Dipchand. (4) Whether both Musammat Khushalo and Sita Ram should be impleaded as respondents to this appeal. (5) Whether the law requires that, as a condition precedent to the further hearing of the appeal, the Court should decide the question whether Musammat Khushalo or Sita Ram is the true representative of the deceased plaintiff-respondent, Dipchand.

As to the first of these points, it is enough to say that the order of the 17th July, 1886, whereby Musammat Khushalo was substituted for the deceased Dipchand as plaintiff-respondent, was passed *ex parte* by a single Judge, and that the *ratio decidendi* upon which the Full Bench ruling of this Court in *Dubey Sahai* v. *Ganeshi Lal* (1) proceeded applies to this case, and that it is, therefore, open to us, as the Bench required to dispose of the appeal, to consider and decide whether the lady has been properly brought upon the record. The remaining four points as enunciated by me can be conveniently dealt with together, because they form elements of one and the same question and require consideration of the same portions of the Civil Procedure Code. That question is, whether, for the purposes of the array of the parties incident upon the death of either of the parties to an appeal, the provisions of s. 582 are such as require us to apply the provisions of chapter XXI of the Code, regardless of the position which either party held in the Court of first instance—that is, regardless of the question whether the party was plaintiff or defendant in the original suit. I confess that in considering this question as a member of the Full Bench of this Court, my difficulty does not arise so much out of the provisions of the Civil Procedure Code itself as from the con-

(1) I. L. R., 1 All. 34.

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flicting state of the case-law upon the subject, and this circumstance renders it necessary for me to consider the exact effect and bearing of the various rulings which were cited and relied upon at the hearing of this case, with reference to the changes which s. 582 of the Civil Procedure Code has undergone since it first appeared in the Code of 1877. The section as it originally appeared in the Code of 1877 ran as follows: "The appellate Court shall have the same powers in appeals under this chapter as are vested by the Code in Courts of original jurisdiction in respect of suits instituted under Chapter V. The provisions hereinbefore contained shall apply to appeals under this chapter so far as such provisions are applicable." By s. 88 of Act XII of 1879 the following words were added to the first paragraph of the section:—"And in ss. 363 and 365 the word 'plaintiff' shall be held to include an 'appellant.'" Whilst the section stood thus, the Calcutta High Court in *Rajmonee Dubee* v. *Chunder Kant Sandel* (1) held that, notwithstanding that s. 582 of the Code of Civil Procedure does not expressly direct that the word 'plaintiff' occurring in s. 366 shall be held to include an "appellant," yet the power conferred by s. 366 on the Court of original jurisdiction to award costs against the estate of a deceased plaintiff may by analogy be taken to be conferred on the appellate Court. And in laying down this rule the learned Judges of the Calcutta High Court followed the ruling of the Bombay High Court in *Lakshmibai* v. *Balkrishna* (2), in which, with reference to ss. 363, 365, 368, and 582 of the Code of 1877, it was held that a procedure analogous to that laid down in s. 368 of the Civil Procedure Code (Act X of 1877) in respect to the death of a *defendant* must be applied in the case of the death of a *respondent*; and that, therefore, where a respondent dies during the pendency of an appeal, it is for the appellant to take the initiative, and he is at liberty to select one or more persons to defend the appeal; and no person other than the person so selected, has a right to force himself into the proceedings and to claim to have his name entered as representative of the deceased respondent against the appellant's consent. It was also held in the same case that persons so introduced on the record may or may not be the real representatives of the deceased respondent;

(1) I. L. R., 8 Calc. 440; 10 Calc. L. R., 437. (2) I. L. R., 4 Bom. 654.

but the merits of their claim to be such, on the ground of any right or status, such as that of adoption, is immaterial to the determination of the appeal.

Both these cases are strong authority for showing that, even as the law then stood, a defendant-appellant was dealt with as plaintiff for the purposes of the array of parties in proceedings arising out of death, &c., although s. 366 was not specifically referred to in s. 582 of the Code as it then stood. In the Calcutta case just cited Mr. Justice Mitter entertained no doubts in the matter, but Garth, C. J., in delivering his judgment in the case, went on to say:—

"S. 582 of the Code has provided that in ss. 363 and 365 the word 'plaintiff' shall be held to include an 'appellant.' If the provision had been made with regard to s. 366, all difficulty in this case would have been removed; but the express mention of ss. 363 and 365 and the omission of s. 366 would rather lead to the supposition that the Legislature did not intend a respondent to have his costs under such circumstances. As my learned brother, however, is disposed to put a more liberal interpretation upon s. 582, and as the view which he takes appears to be supported by the Bombay High Court in the case to which he has referred, I shall not differ from him on this occasion, more especially as, in my opinion, the justice of the case is entirely in accordance with that view. We trust that the omission, if it is one, may be supplied in the Bill to amend the Civil Procedure Code, which is now before the Legislative Council."

The Bill to which the remarks referred was the one which on passing has become the present Civil Procedure Code of 1882, and it was probably in consequence of this suggestion that s. 582 was amended. The words inserted by s. 88 of Act XII of 1879, as addition to the first para. of s. 582 of the Code were cut out and the following words substituted therefor: "And in Chapter XXI, so far as may be, the words 'plaintiff,' 'defendant', and 'suit' shall be held to include an appellant, a respondent, and an appeal, respectively, in proceedings arising out of the death, marriage, or insolvency of parties to an appeal." The main question, therefore, before us is, what is the effect of these alterations upon the facts of a case such as this? In other words, the question is whether

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the *defendants*-appellants in this case are or are not in exactly in the same position *as to the array of parties* as they would have been if they had been plaintiffs in the original suit and the death of the *defendant* had occurred during the pendency of the suit.

I should have had no difficulty in answering this question in the affirmative but for the fact that in the Full Bench ruling of this Court (1) in *Narain Das* v. *Lajja Ram*, in which I had the misfortune of being in the minority of one, there is a great deal in the *ratio decidendi* adopted by the majority of the Court which clashes with my views upon this point. The general effect of the view adopted by the majority of the Court in that case is that, even for the purposes of the array of parties to an appeal arising out of the incident of the death of one of the parties, a *plaintiff* continues to be a plaintiff and a *defendant* a defendant for the purposes of chapter XXI of the Civil Procedure Code, notwithstanding s 582 of the Code of 1882. In other words, the effect of the *ratio decidendi* of that ruling is to hold, as I pointed out in *Rameshar Singh* v. *Bisheshar Singh* (2) and again in *Grant* v. *The Oudh and Rohilkhand Railway Company* (3), that it is not the duty of a *defendant*-appellant to implead any one as respondent upon the death of a *plaintiff*-respondent. In the last-mentioned case (which has not been reported in the authorised reports) I said: "Cases have occurred within my own experience, in which, during specially unhealthy seasons, both the appellant and the respondent have died, and in which there is some difficulty in knowing how to act. In this case the difficulty would have been considerably enhanced if the plaintiff were not also the applicant and if the defendant had not occupied the same defensive position before us as he occupied in the Court below. This would be the result of the ruling of the Full Bench in *Narain Das* v. *Lajja Ram* (1) to which I was a party, but in which I had the misfortune to differ from the late learned Chief Justice and my other learned colleagues regarding the interpretation to be placed upon a clause of s. 582, Civil Procedure Code, which happens to have been drafted and submitted by myself to the Legislature word for word as it now stands. The effect of the judgment of the majority of the Court in that case, as I pointed out in *Rameshar Singh* v. *Bisheshar Singh* (2) is that the appeal by a defendant is absolutely

(1) I. L. R., 7 All 693. (2) I. L. R., 7 All. 784.
(3) Weekly Notes, 1886, p. 90.

free from abatement, if he chooses to decline to implead any person to represent the deceased *plaintiff*-respondent, and the appeal would go on for ever upon our file if no one volunteered as representative of the deceased *plaintiff*-respondent. Such is not the interpretation which the authors of the clause either intended or could accept; and I still think, with due deference to the Full Bench ruling of the majority of the Court, that the ruling will probably have to be reconsidered as soon as we have a case where the *defendant*-appellant neglects—or, to put the point more strongly—deliberately declines to implead any person as representing a deceased *plaintiff*-respondent, and the representative of the latter makes no endeavours to appear. And I may respectfully say that I still think that just as it is the duty of a defendant against whom a decree is passed when filing his appeal to implead the plaintiff as respondent, so it is his duty to implead the representatives of the plaintiff who dies *before* the appeal is instituted, for it is obvious that in such a case no appeal could be instituted *ex parte*, and no Court would admit an appeal which did not name any respondent at all or named a respondent who was admittedly no longer alive. Nor am I aware of any juristic reason why this duty of impleading the opposite party imposed upon the appellant should vanish simply because the plaintiff-respondent has died *after* and not *before* the appeal is preferred. Notwithstanding the high authority of Petheram, C. J., and the learned Judges who followed him, I humbly venture to think that the views expressed by me are in accord with the practice of the House of Lords in appeals where such questions arise, if not also of the other Courts of appeal in England itself. In the absence of books of reference on this subject in the library of this Court I have not been able to study the matter, and I have indulged in these *obiter dicta* principally to place upon record the views I entertain in the hope that when the Legislature thinks fit to amend the Civil Procedure Code, they may perhaps take these observations into consideration."

It is just possible that it was in consequence of these observations, as also the remarks which I made in my dissenting judgment in the Full Bench case of *Narain Das* v. *Lajja Ram* (1), the Legislature in accepting Bill No. II of 1887 (now pending before the Legislature) to amend the Code of Civil Procedure, proposed in

(1) I. L. R., 7 All. 693.

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s. 48 of the Bill to alter the language of s. 582 of the Code in the following manner: "In s. 582, for the words the words" 'plaintiff,' 'defendant,' and 'suit' shall be held to include an appellant, a respondent, and an appeal, respectively, the following shall be substituted, namely, the word 'plaintiff' shall be held to include a plaintiff-appellant or defendant-appellant, the word 'defendant' a plaintiff-respondent or defendant-respondent, and the word 'suit' an appeal" (1).

I have quoted this proposed section, not because it can be utilised as a means of interpreting the Code as it now stands, but because it formulates in specific language the law as it already stands, subject of course to such difficulties as have arisen out of the case-law. Some of the cases which have given rise to the difficulties have already been cited by me, and although I have no intention of repeating what I said in my dissenting judgment in the case of *Narain Das* v. *Lajja Ram* (2), I shall deal with that case as the central point from which this Court sitting in Full Bench should view the rulings of the other High Courts bearing upon the point now before us.

I have already mentioned what the Bombay High Court ruled in *Lakshmibai* v. *Balkrishna* (3) with reference to the Code of 1877; and I may add that a similar rule was laid down by that Court under the present Code in *Bai Javer* v. *Hathi Sing Kesri Sing* (4) where it was held that, under s. 368 of the Civil Procedure Code (XIV of 1882), a plaintiff may have the representatives of a deceased sole defendant placed on the record, so that he may continue his suit against them; but there is no section which allows the representatives of a sole defendant who has died to be placed on the record at their own request; that consequently s. 582 gives no authority to a civil Court to place on the record at their own request the representatives of a deceased sole respondent, and that such an application cannot be entertained. It is clear that both these cases are not only consistent with what I said in the case of *Narain Das* v. *Lajja Ram* (2), but go somewhat too far according to my view of the law. The next case which I wish to cite is *Soshi Bhusan Chand* v. *Grish Chunder Taluqdar* (5) where the

(1) See Act VII of 1888, s. 53 (1). (2) I. L. R., 7 All. 693.
(3) I. L. R., 4 Bom. 654. (4) I. L. R., 9 Bom. 56.
(5) I. L. R., 11 Calc. 694.

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Calcutta High Court laid down a rule wholly in accord with what I said in the Full Bench case of his Court, because the learned Judges (Field and Beverley, JJ.) held that, having regard to s. 3 of Act XIV of 1882, it is clear that the word 'Code' in sch. ii, art. 171B of Act XIV of 1877, applies to the present Code of Civil Procedure (Act XIV of 1882), and that, therefore, the word "*defendant*" in s. 368 of that Code when read with s. 582 must be held to include "*respondent*." This view was, however, repudiated by the Full Bench of the same Court in *Udit Narain Singh* v. *Harogouri Prosad* (1), and in doing so the learned Judges followed the ruling of the majority of this Court in the Full Bench case of *Narain Das* v. *Lajja Ram* (2), though judging from the report of the case I cannot but feel, with due deference, that the attention of the learned Judges was not called to my dissentient judgment. Nor can I help feeling that the learned Judges of the Full Bench of the Madras High Court in dealing with a similar question in *Lakshmi* v. *Sri Devi* (3) had not directed their attention to the reasons upon which my humble judgment in *Narain Das* v. *Lajja Ram* (2) proceeded; and I make this special reference to what I said at pp. 700 and 701 of the authorised report.

It is of course clear that like the Full Bench case of this Court in *Narain Das* v. *Lajja Ram* (2) some of the cases before the other High Courts, which I have just cited, turned upon the interpretation of a clause of the Limitation Act (XV of 1877) as amended by s. 108 of a later statute, namely, Act XII of 1879. I suppose no one who has studied the rulings in those cases will deny that in interpreting s. 582 of the present Code of Civil Procedure (Act XIV of 1882), they have been materially influenced by the terms of an earlier statute, namely, the Limitation Act (XV of 1877) as amended by Act XII of 1879. I have cited these cases out of deference to the learned Judges who delivered judgments in those cases in this Court, as also in the High Courts of Calcutta and Madras, though I have felt, and still feel, very great difficulty in either regarding the statutes of limitation as *in pari materia* with the Civil Procedure Code, or in holding that a later statute, such as this present Civil Procedure Code, is to be interpreted and governed by an earlier statute which deals with a different department of adjective law.

(1) I. L. R., 12 Calc. 590 (2) I. L. R., 7 All. 698.
(3) I. L. R., 9 Mad. 1.

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Having so far dealt with the most important cases bearing upon the question now before us, I wish to state what seems to me to be a simple proposition of law, consistent as it is with juristic reasoning. We all know that the maxim *ubi jus ibi remedium* is a fundamental principle of our law, and that primarily it applies only to causes of action which have to be dealt with by Courts of original jurisdiction, that is, Courts of first instance. But the principle upon which the maxim is based is applicable as much to Courts of appeal as it is to Courts of first instance, that is to say, that whilst in the Court of first instance the plaintiff complains of an injury *ante litem motam*, in a Court of appeal the main complaint of the appellant is that injury has been done to him, not only by the act of the opposite party, but by a wrongful exercise of jurisdiction by the lower Court. As a matter of juristic reasoning, there is no substantial difference between the position of a plaintiff in the original Court and that of an appellant before the Court of appeal, whether such appellant was plaintiff or defendant in the original Court. The juristic reason is simple, namely, that the maxim *omnia praesumuntur rite esse acta* is comprehensive enough to include not only acts *ante litem motam*, but also the acts of a Court. There is, therefore, no more reason to presume that a defendant has committed an injury than there is to presume that a *plaintiff*-respondent has obtained a wrong decree because of the error of the lower Court. In both cases the presumption of law is that, till the contrary is proved, acts which have actually occurred, whether done by a party to the litigation or by a Court of justice, were rightly done. And if I am right so far, for whom is it in a case of appeal to show that the decree of the lower Court was wrongly passed? Surely it is not for him who has obtained a judgment in his favour, but for him who impugns that judgment to show that the judgment is wrong; and I find it extremely difficult to conceive how an appellant can be exonerated from this duty by dint of the simple fact that he happened to be defendant in the original Court. And if this is so I fail to see any reason, either in jurisprudence or law, why a *defendant*-appellant in the Court of appeal should be placed upon a footing different from that of a plaintiff in the original Court, with reference to the array of parties, for the purposes of obtaining his remedy. Such remedy

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in the Court of first instance would of course be obtaining a decree or an injunction, and in the Court of appeal the remedy aimed at would be the reversal of a judgment, decree, or injunction, for, whichever the case may involve, the principle remains that *omnia præsumuntur rite esse acta.*

Now, dealing with this point somewhat concretely, I suppose nobody would deny that a defendant against whom a decree has been passed is the person who must complain of the decree if he chooses to impugn it. Nor do I think any one would deny that under our Code of Civil Procedure it is not the duty of the successful plaintiff, but of the defendant, to implead some one as a respondent to the appeal. But the successful plaintiff may have died *before* the appeal is filed. Whose duty then would it be to bring the proper parties before the Court of appeal to enable that Court to adjudicate upon the appeal? Surely it would not be the duty of the successful plaintiff to impugn the judgment which is in his favour. And if this is so, the party who could or would appeal would in the case supposed be the defendant who had been unsuccessful in the Court below. It is accepted as a sound principle of adjudication by all civilised nations that *audi alteram partem*, and how is the appellate Court to hear the appeal of a *defendant*-appellant without hearing the other side? And how is it to hear the other side if the *defendant*-appellant either names a dead person (a *plaintiff*-respondent) or does not name any living person as the legal representative of the deceased?

It seems to me, therefore, to be the undoubted duty of the appellant, be he plaintiff or defendant in the original action, to implead some one as respondent, and, if the opposite party is dead, to implead some one as the legal representative of the deceased. Such no doubt would be the case if a plaintiff-respondent died before the filing of the appeal by the defendant-appellant. And for what reason can this duty vanish if the death of the plaintiff-respondent takes place not *before* the institution of the appeal but during the period of its pendency? The effect of the *ratio decidendi* of the ruling of the Full Bench of this Court in *Narain Das* v. *Lajja Ram* (1) can suggest only one answer, namely, that the appeal must remain pending for ever, or at least till so long as the legal

(1) I. L. R., 7 All. 693.

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representatives of a deceased *plaintiff*-respondent do not apply to have their names substituted as respondents. To the question arising from such a state of things, the ruling of the Bombay High Court in *Lakshmibai* v. *Balkrishna* (1) and in *Bai Javer* v. *Hathi Sing Kesri Sing* (2) would furnish the answer that the legal representatives of the deceased *plaintiff*-respondent have no *locus standi* to make an application to be substituted as representatives of the deceased; and the Full Bench ruling of the majority of this Court, as also the Full Bench rulings of the Calcutta High Court and Madras High Court, would lead to the conclusion that a defendant-appellant can choose his own time for making an application to implead the legal representatives of a deceased *plaintiff*-respondent, the appeal in the meantime being free from liability to abatement.

I confess that I find it extremely difficult to hold that such was the intention of the Legislature. I make this observation, of course, with profound respect for the rulings which I have cited; and with equally profound respect I may observe that the whole difficulty in connection with the array of parties has arisen out of a misapprehension of the juristic principles upon which our Code of Civil Procedure is based. A due consultation of the various parts and chapters into which the Code is divided will show that the essential rules governing the procedure of the Courts of first instance form the body of the statute, and those same provisions, *mutatis mutandis*, have been rendered applicable, not only to the first appellate Court, not only to the second appellate Court, but also to the Courts exercising civil jurisdiction in miscellaneous cases. Such, stating the matter briefly, is the effect of ss. 582, 587, and 647 of the Code; and speaking for myself, I cannot conceive how a workable Code could be framed upon better principles. The Code is, as we all know, the outcome of the labours of one of our most eminent jurists, Lord Hobhouse, now one of the Lords of the Privy Council, with the co-operation and assistance of another great jurist, Mr. Whitley Stokes, who, in the position of Law Member of the Legislature, is no doubt mainly responsible for s. 582 of the Code of 1882 as it now stands. The Code so framed, is, to my mind, perfectly clear, and if difficulties

(1) I. L. R., 4 Bom. 654. (2) I. L. R., 9 Bom. 56.

have arisen in this Court, as also in the other High Courts, over the matter now before us, it is due, as I humbly and respectfully think, to some misapprehension of the method upon which the Code has been framed. I have said so much because the policy upon which the Legislature has framed s. 582 of the Code cannot be fully realised, unless it is accepted that, as a pure matter of codification and drafting statutes, it would be nothing more nor less than clumsy to reproduce or repeat in the appellate chapters or in the chapter relating to miscellaneous proceedings, the provisions of the procedure already well defined and accurately expressed in the earlier chapters of the Code, and which provisions, as matters *ad litis ordinationem*, are as suitable for appeals and miscellaneous proceedings as for regular original suits.

This is in effect what I said in one of the cases to which I have already referred; and since I am sitting again as a member of the Full Bench of this Court, which can overrule the *ratio decidendi* of the Full Bench ruling in *Narain Das* v. *Lajja Ram* (1), I must, with due deference to the majority of the Court as then constituted, repeat what I held in that case, namely, that the object of s. 582 of the Civil Procedure Code is to obviate the necessity of repeating the provisions of chapter XXI, as also to make them applicable to appeals, and the words "appellant" and "respondent," as used in the section, include both plaintiffs and defendants in an appeal; that the whole Code maintains the analogy between the position of a respondent and that of a defendant for the purposes of being impleaded and brought before the Court; that chapter XXI applies to cases where a *plaintiff*-respondent has died; and that in such a case, and where no application has been made within the period prescribed therefor, praying that the legal representatives of the deceased be made parties in his place, the appeal abates.

To this view I still adhere; and I may respectfully say that I do so partly because in the reports of the cases already cited by me laying down a different rule, I have failed to trace any attempt to meet the reasons which my judgment in the case just cited relied upon. Holding these views still, I need only say that not only s. 582 but the provisions of the whole Code of Civil Proced-

(1) I. L. R., 7 All. 693.

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ure far from presenting difficulties of interpretation, become wholly intelligible and consistent when s. 582 is read in the sense in which I respectfully think it was framed. That sense is best enunciated in the second paragraph of the present Bill to amend the Code, namely, that "*the word 'plaintiff' shall be held to include a plaintiff-appellant or defendant-appellant, the word 'defendant' a plaintiff-respondent or defendant-respondent, and the word 'suit' an appeal.*"

In this view of the matter, the points before us become very simple, because, for the purposes of the array of the parties, s. 582 read with s. 587 of the Civil Procedure Code, renders the provisions of chapter XXI of the Code relating to incidental proceedings arising from the death of parties applicable to this case in such a manner that the appellant, whether *plaintiff* or *defendant* in the original Court, must be dealt with as *plaintiff* for the purpose to which that chapter relates. And if I am right so far, I need only refer to the provisions of that chapter for stating my view of the law. S. 368 which occurs in that chapter lays down *inter alia* that in case of the death of one of several defendants or of the sole defendant, "the plaintiff may make an application to the Court, specifying the name, description, and place of abode of any person whom he alleges to be the legal representative of the deceased defendant, and whom he desires to be made the defendant in his stead." The section further goes on to say that "the Court *shall* thereupon enter the name of such representative on the record in the place of such defendant, and *shall* issue a summons to such representative to appear on a day to be therein mentioned to defend the suit; and the case *shall* thereupon proceed in the same manner as if such representative had originally been made a *defendant* and had been a party to the former proceedings in the suit, provided that the person so made defendant may object that he is not the legal representative of the deceased defendant, or may make any defence appropriate to his character as such representative."

In the present case, whilst the *defendants*-appellants insist upon impleading Sita Ram as the legal representative of the deceased, Musammat Khushalo, as the widow of the deceased, far from objecting to be impleaded as respondent, has applied to be so

impleaded, though the application is objected to by the *defendants*-appellants. Now, in dealing with such a state of things, the law ceases to present any difficulties if we interpret s. 368 of the Code in the sense in which s. 582 of the Code intends that section to be interproted. In other words, the provisions as to the impleading of *defendants* become applicable to the impleading of respondents, whether such respondents were *plaintiffs* or *defendants* in the original suit. And, indeed, I am prepared to go further and say that reading s. 582 of the Code as a whole, the section confers upon the appellate Court all the powers conferred upon the Courts of original jurisdiction in connection with such matters ; and those extensive powers have also been conferred upon the Courts of second appeal by s. 587 of the Code. Thus not only s. 368 of the Code becomes applicable to this case, but also all the other sections of the Code as to the array of the parties, such as s. 32.

To put the matter more concretely, the *defendants*-appellants must in this case be treated as *plaintiffs* and the plaintiff-respondent Dipchand, deceased, as a *defendant*. On this hypothesis there is no question of the death of a *plaintiff* in this case, and therefore the provisions of ss. 363, 364, 365, 366, and 367 have no application. Upon the same hypothesis, what has really occurred is that a sole "*defendant*" has died, and a dispute has arisen as to who is his legal representative for the purposes of the litigation. The *defendants*-appellants (who must be regarded as *plaintiffs*) state that the deceased respondent (who must be regarded as *defendant*) lived jointly with his father, Sita Ram, who is therefore, as a surviving member of a joint Hindu family, the legal representative of the deceased, and it is only him whom they wish to implead for the purposes of carrying on this appeal. On the other hand, the widow of the deceased, Musammat Khushalo, wishes to force herself into the litigation, in spite of the wishes of the appellants, on the contention that her husband was separate from his father, and that she is therefore his legal representative in preference to his father, Sita Ram.

To the former part of this state of things s. 368 of the Code (reading it as I do in the light of ss. 582 and 587 of the Code) is fully applicable. The effect of that section so interpreted is that upon the application of the appellant, the Court "*shall*" enter the name of

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any person whom he desires to implead as legal representative of the deceased respondent. In this view the Court has no choice with reference to impleading Sita Ram, because the provisions of the statute are imperative. Then as to the latter part of the state of things already described by me, that is, the application of Musammat Khushalo, the provisions of the first part and the last paragraph of s. 582 (read with s. 587) are applicable, and, in my opinion, the claims of the widow to be impleaded in the action must be dealt with upon principles of s. 32 of the Code, so far as they are applicable to the array of the parties in appeals. The words of the last paragraph of s. 582 are very comprehensive and seem to be consistent with the principles upon which such matters are dealt with by Courts of appeal in England, for, if I remember rightly, there are cases to be found in the English reports where even third persons have been made parties to appeals where the sound discretion of the Court required such a course. The ruling of Lord Selborne, L. C., and Brett and Cotton, L. JJ., in *Markham* v. *Markham* (1) is an illustration of what I have just said ; and although I am not prepared to say definitely one way or the other that our powers in such matters under our Code are as extensive as those of the Courts of appeal in England under their rules of procedure, I think I may say that the principles upon which those Courts proceed furnish a good guide for our own procedure in cases of doubt.

Nor is the view which I have taken unsupported by the authority of the Indian case-law. In the case of *Athiappa* v. *Ayanna* (2) Sir Charles Turner, C. J., in delivering the judgment of the Court, and referring to the Bombay ruling in *Lakshmibai* v. *Balkrishna* (3) which, as I have already stated, was followed in *Bai Javer* v. *Hathi Sing Kesri Sing* (4) went on to say : "While we agree with the learned Judges of the High Court of Bombay that the Court must place on the record the person indicated as the representative of a deceased respondent, we are not prepared to say that in no case can the Court place on the record any other person as filling that character. The Court has the same power to make parties to an appeal as it has to make parties to a suit ; and where there appears a substantial doubt whether the person indicated by an appellant is the

(1) L. R., 16 Ch. Div. 1.
(2) I. L. R., 8 Mad. 300.
(3) I. L. R., 4 Bom. 654.
(4) I. L. R., 9 Bom. 56.

representative of a deceased respondent or a representative for all purposes connected with the matters in litigation, and a person other than the person indicated by the appellant lays claim to the representative character, and on good *primâ facie* grounds, and where, if he be not allowed to join, the interests of the person entitled to the estate of the deceased may be prejudiced, we consider the Court ought to proceed under s. 32 to make him a party to the appeal."

This ruling was concurred in by Mr. Justice Mutusami Ayyar, and I am of opinion that it lays down a sound principle of law. There are, of course, some portions of s. 32 of the Code which may not be applicable to the procedure of the appellate Court, but so far as the matter now before us is concerned I think that that section is applicable. I have already said that the provisions of s. 367 of the Code are not applicable because the *defendants*-appellants are *alive*, and being dealt with as plaintiffs for the purposes of the array of parties, no dispute has arisen as to who is the proper legal representative. And what we have to consider is whether Musammat Khushalo has any such *primâ facie* right as would entitle her to be made a party respondent to this appeal. Sita Ram, the father of the deceased Dipchand, respondent, as I have already said, must *necessarily* be impleaded, because he has been named by the appellants as the person against whom they wish to prosecute their appeal; and so far as Musammat Khushalo is concerned, I think that although her application to be made a party respondent to this appeal is opposed by the appellants, and may for aught we know be contested by Sita Ram also, we are not called upon to apply the procedure laid down in s. 367 of the Code of Civil Procedure, for the simple reason that the plaintiff-respondent, (Dipchand) cannot, according to my view, be regarded as a *plaintiff* for purposes of the array of parties to this appeal. All that we have to consider is whether Musammat Khushalo has any such *primâ facie* case as would entitle her to be made a party respondent to this appeal under s. 32 read with ss. 582 and 587 of the Code of Civil Procedure. Even a Court of first instance is not required by our laws to decide any dispute as to the legal representation of a deceased *defendant*, and I fail to see why a Court of appeal should be called upon either to decide such a dispute as

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to the legal representation of the deceased respondent and thus stay the decision of the appeal. In the present case, what I have gathered from the argument addressed to us at the bar is that the contention as to the legal representation of the deceased Dipchand rests mainly upon the decision of the question whether he was a member of a joint Hindu family with his father, Sita Ram, or was separate from him. We know that such questions are as a rule very difficult to decide and rest upon very minute details of evidence upon the issue when raised. It is obvious that no adjudication on such an issue when it arises between two defendants (i.e., two respondents) can bind them, and it seems to me that we shall only be delaying the disposal of this appeal if we apply s. 367 of the Code to this matter, and either decide the issue ourselves or stay the hearing of the appeal until the issue has been determined in another suit.

I do not wish to go into the details of the juristic reasons why the rules of procedure, *ad litis ordinationem*, applicable to a dispute as to the legal representation of a *plaintiff* are not the same as those which relate to a dispute in connection with the legal representation of a deceased *defendant*. The reason why I do not go into those details is that I have already given my reasons for holding that a *plaintiff*-respondent, such as Dipchand in this case, must be treated as a defendant for the purposes of the array of the parties to an appeal such as this; and that whilst Sita Ram must necessarily be impleaded as respondent, the claims of Musammat Khushalo to be impleaded also as a respondent must be dealt with under s. 32 of the Code read with ss. 582 and 587.

This view explains why I have said that the ruling of the Bombay High Court in *Lakshmibai* v. *Balkrishna* (1) went too far in holding that no application could be made by a claimant to a deceased respondent to be impleaded in an appeal as a respondent. In my opinion the ruling of the Madras High Court in *Athiappa* v. *Ayanna* (2) solves the difficulty in this case. And adopting that ruling, I hold that Musammat Khushalo has in this case shown a sufficient case to entitle her to be made a respondent in this appeal without the condition precedent of any decision whether she or Sita Ram is the proper legal representative of the deceased Dipchand.

(1) I. L. R., 4 Bom. 654. (2) I. L. R., 8 Mad. 300.

Having said so much as to the views which I hold, I now proceed to state *seriatim* the specific answers to the five questions which, as I stated at the outset, arise in this case. My answer to the first question is that the order of the 17th July, 1886, whereby Musammat Khushalo was brought upon the record as the legal representative of the deceased plaintiff-respondent, Dipchand, can be rescinded by the Bench at this stage, that is, after having heard the defendants-appellants.

To the second question my answer is that, notwithstanding the objections of the defendants, Musammat Khushalo, as the childless widow of the deceased plaintiff-respondent, Dipchand, occupies a position which affords her a sufficient *primâ facie* status to resist the appeal, and, as such, to be impleaded as respondent under s. 32 of the Code of Civil Procedure read with ss. 582 and 587 of that Code.

To the third question my answer is that the defendants-appellants, being in the position of the plaintiffs for the purposes of the array of parties to their appeal, were bound by law to implead some one to represent the deceased plaintiff-respondent, Dipchand; that their omission to do so would subject them to the penalty of the abatement of their appeal under s. 368 read with ss. 582 and 587 of the Code of Civil Procedure ; that this Court is therefore *bound*, by reason of the specific provisions of s. 568, to implead Sita Ram as a respondent to this appeal.

To the fourth question my answer is that under the circumstances of this case both Musammat Khushalo (who has already been brought upon the record as a respondent) and Sita Ram should be made parties to this appeal by reason of s. 32 read with ss. 582 and 587 of the Code of Civil Procedure (Act XIV of 1882).

To the fifth question my answer is that there exists no authority in our Code of Civil Procedure either to require or permit the decision of disputes as to the legal representation of a deceased plaintiff-respondent (any more than the Code requires or permits adjudication upon such questions when they arise between two or more defendants in the Court of first instance) ; that, therefore, the question whether Musammat Khushalo or Sita Ram is the proper legal representative of the deceased plaintiff-respondent Dipchand

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is a matter which we not only need not determine for the purposes of this appeal, but is a matter which we cannot determine under the rules of procedure as a condition precedent to the further hearing of this appeal.

I would therefore, without adjudicating upon the question whether Musammat Khushalo or Sita Ram is the proper legal representative of the deceased plaintiff-respondent, Dipchand, bring both upon the record as parties respondents to this appeal and would proceed to decide the appeal after having heard both of them.

As I understand the judgment of the majority of the Court, I take it to mean that it is not by reason of any provisions in the Code that we are required to hold an inquiry whether Sita Ram or Musammat Khushalo is the proper legal representative of the deceased plaintiff-respondent, Dipchand. I also take that judgment to mean that it is not upon the authority of any case-law existing in India or in England that such an inquiry is proposed to be held. I also understand that judgment to imply that even though a plaintiff-respondent may stand in the position of a defendant within the meaning of s. 582 of the Code, his death renders the question as to whether A or B is his legal representative a matter for adjudication by the Court as a condition precedent to the further progress of the appeal, and that such an adjudication can be made under an inherent power of the Court regulated by considerations of convenience and promotion of the ends of justice.

I regret that I cannot accept these views, for I cannot help holding that, even accepting the doctrine of inherent power in matters of procedure, the views adopted by the majority of the Court, far from resulting in convenience of procedure, will tend to prolong litigation and not necessarily obviate the inconveniences or difficulties anticipated from the view of the law which I have taken.

I am not aware of any rule of law which requires a Court in dealing with a case such as this to adjudicate upon the conflicting claims of two *defendants*, and if the deceased plaintiff-respondent in this case, Dipchand, is to be treated as a defendant within the meaning of s. 582 of the Code, I can find no authority either in that Code or in the case-law to necessitate an adjudication between the contending claims of two or more persons claiming to be the

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legal representatives of the deceased. In such cases there may be not only two but many more persons, each claiming to be the proper legal representative of the deceased to the exclusion of the others, and if the law requires adjudication upon their respective rights as a condition precedent to the progress of the appeal, the effect would be to prolong litigation. And I may add that, even if such rights are adjudicated upon, it is far from certain that any such adjudications, when made by a Court of appeal in a case such as this, would be conclusively binding upon parties.

I need not, however, pursue this matter further, because although it may possibly be true that Sita Ram is in collusion with the present defendants-appellants (who have named him as the proper legal representative of Dipchand), yet it may also be true that he is the real representative and not Musammat Khushalo, and it may also be true that both of them are his legal representatives. It may also be possibly the fact that there is a third person or persons of whose existence we have not heard, and who, by reason of the existence of a will or otherwise, are the proper legal representatives, but whose existence has not been brought to our notice by any of the parties to this litigation.

In a state of things such as this, what is the duty of this Court? Is it its duty to go about searching for the real legal representatives of the deceased? And if it is not, it is clear that, whether we have Musammat Khushalo or Sita Ram as the proper legal representative of the deceased Dipchand, our decree must necessarily be ineffective against those who are no party thereto, rendering further litigation necessary if the party or parties whom we hold to be the legal representatives of the deceased Dipchand are not his proper legal representatives. It seems to me that the difficulties and inconveniences contemplated by the judgment of the majority of the Court are such as no system of procedure can avoid. Indeed, those difficulties and inconveniences increase, and have the effect of prolonging litigation, when attempts are made to adjudicate upon the rights of parties arrayed on the same side, whether in a Court of first instance or a Court of appeal.

Opposed to the view of the law which I have taken, two judgments have been relied upon which I have not yet mentioned.

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One is the case of *Narain Kuar* v. *Durjan Kuar* (1), which relate to the exercise of powers under s. 32 of the Code, and the other case is *Har Narain Singh* v. *Kharag Singh* (2). The former of these cases does not appear to me to clash with my views because there is no question of intervenors in this case; but the latter no doubt militates against the *ratio decidendi* which I have adopted in this case. With much that was laid down in that case I am respectfully unable to agree for the reasons which I have already fully stated.

There is only one more point to which I need refer, *viz.*, the difficulty contemplated as to costs if my views of the law were adopted. Under s. 223 of the Code of Civil Procedure read with ss. 582 and 587 of that enactment this Court would have the power to make any order as to costs within its judicial discretion, just as a Court of first instance would have similar power. And in this appeal, if Sita Ram has been improperly impleaded, or if Musammat Khushalo has wrongly forced herself upon the record as a party to the appeal, and the appeal prevails or fails, these would be considerations regulating the discretion of the Court regarding the order as to costs.

For these reasons, without adjudicating upon the contention of the appellants that Sita Ram is the proper legal representative of the deceased Dipchand, and without adjudicating upon any such claims as he may have to that capacity as against Musammat Khushalo or *vice versâ*, I would place both upon the record as parties respondents to this appeal, and would proceed to hear the same and dispose of it.

1888
April 30.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

CHAJMAL DAS AND OTHERS (DEFENDANTS) v. JAGDAMBA PRASAD (PLAINTIFF).*

Civil Procedure Code, ss. 3, 368, 582—*Act XV of* 1877 (*Limitation Act*), *sch. ii, Nos.* 171B, 178—*Death of plaintiff-respondent—Application by defendants-appellants for substitution of legal representative.*

The judgment of the majority of the Full Bench in *Narain Das* v. *Lajja Ram* (3) only decided that art. 171B, sch. ii, of the Limitation Act of 1877, did not apply

* First Appeal No. 59 of 1884 from a decree of Maulvi Muhammad Basit Khan, Subordinate Judge of Mainpuri, dated the 31st March, 1884.

(1) I. L. R., 2 All. 738. (2) I. L. R., 9 All. 447.
(3) I. L. R., 7 All. 693.

to an application by a defendant-appellant to have the representative of a deceased plaintiff-respondent made a respondent. Art. 178 applies to such applications.

So *held* by the Full Bench, MAHMOOD, J., dissenting.

Held by MAHMOOD, J., that by reason of s. 3 (read with ss. 368 and 582) of the Civil Procedure Code, the word "defendant" in art. 171B, of the Limitation Act necessarily includes a plaintiff-respondent. *Soshi Bhusan Chand* v. *Grish Chander Talugdar* (1) referred to.

This was a suit brought by one Jagdamba Prasad for possession of a share of alleged ancestral property which was sold in execution of simple money decrees against the plaintiff's father, Narain Lal. The Court of first instance decreed the claim in full on the 31st March, 1884. On the 15th April, 1884, the defendants (purchasers under the decrees in execution of which the property in suit had been sold) appealed to the High Court from the Subordinate Judge's decree. On the 17th September, 1885, while the appeal was pending, the plaintiff-respondent died.

On the 20th March, 1888, an application was made on behalf of one Musammat Genda Kuar, mother of the deceased plaintiff-respondent, in the following terms :—

1. "That your petitioner's name be entered as the heiress and legal representative of her deceased son, Jagdamba Prasad, plaintiff in the original suit under the provisions of ss. 365, 366, and 582 of the Civil Procedure Code (Act XIV of 1882).

2. "That as the appellants (defendants in the suit) have failed to bring the proper legal representative of the deceased respondent into Court within the time prescribed therefor by the Limitation Act, their appeal be ordered to abate under the last paragraph of s. 368 coupled with s. 582 of the Code."

The appeal came for hearing before Straight and Mahmood, JJ., It was ordered to be laid before the Full Bench for consideration of Musammat Genda Kuar's application.

The Hon. *T. Conlan*, Munshi *Hanuman Prasad*, and Lala *Juala Prasad*, for the appellants.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the respondent.

(1) I. L. R., 11 Calc. 694.

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CHAJMAL DAS v. JAGDAMBA PRASAD.

EDGE, C. J.—In this case the plaintiff obtained a decree from the Court below. From that decree an appeal was filed in this Court on the 15th April, 1884. The plaintiff-respondent died on the 17th September, 1885. No application has been made by or on behalf of the appellant to bring upon the record the representative of the deceased plaintiff-respondent, nor has any representative of the deceased plaintiff-respondent applied to be brought upon the record. The present application, which was preferred on the 20th March, 1888, is made on behalf of the mother of the deceased plaintiff-respondent. It is an application for an order of the Court decreeing that the appeal has abated. I consider that the judgment of the majority of the Full Bench in the case of *Narain Das* v. *Lajja Ram* (1), notwithstanding the head-note, simply decided that article 171B of sch. ii of the Limitation Act of 1877 did not apply in that case. That case is on all fours with that now under consideration, so far as the question of limitation is concerned. The result of that decision, I think, must be that art. 178 of sch. ii of the Limitation Act must apply. As three years have not expired since the death of the plaintiff-respondent, and as I do not propose to reconsider the question decided in the case of *Narain Das* v. *Lajja Ram* (1), I think that the application is premature and, as such, must be rejected with costs.

STRAIGHT, J.—I am of the same opinion. I was a party to the Full Bench ruling in this Court to which the learned Chief Justice has referred. Any one who will take the trouble to read what I said in that case will find that what I laid down there was that art. 171B of the Limitation Act did not apply to a case like this. I was of opinion, for reasons stated therein, that the word "respondent" had, whether from intention or mistake, been omitted from that article, and comparing it with the preceding article, I showed, in reference to s. 582, that it seemed rather as if it had been intentionally omitted. That view has been adopted by five Judges of the Calcutta Court, and the same view has been taken by the Madras Court. I add these remarks for the purpose of showing that when I used the expression at the end of my judgment in that case, "it therefore appears to me impossible to say that the appellant in the present case has failed to make the application within the period

(1) I. L. R., 7 All. 698.

prescribed therefor, because no period for making such an application is in fact prescribed at all," I was limiting my remarks to art. 171B, no other article having been suggested to me, and it not having occurred to my mind that art. 178 of the Limitation Act was applicable. I think that art. 178 is applicable, and that, therefore, where a respondent dies, the appellant has three years from the date of such death, that is to say, from the date "when the right to make the application" accrues to him, to come into Court and have the heirs of the deceased respondent brought on the record. I concur with the learned Chief Justice that this application is premature and that it should be rejected with costs.

BRODHURST, J.—I also concur with the learned Chief Justice.

TYRRELL, J.—I concur.

MAHMOOD, J.—The order which I have to make on this application must be the same as that made by the majority of the Court. But I am anxious to guard myself against being understood to hold that the provisions of s. 582 of the Code of Civil Procedure, read with s. 368 of that Code, would not render the word 'defendant' as used in art. 171B, sch. ii, Limitation Act, applicable also to the case of the death of the plaintiff-respondent. I say this, of course, with due deference to the rulings to the contrary, which need, however, not be now cited. I dealt with most of those cases in my dissentient judgment in the Full Bench case of *Narain Das* v. *Lajja Ram* (1). At page 700 of the report I expressed the exact reasons why by dint of the interpretation clause of the Civil Procedure Code, the word defendant occurring in art. 171B, sch. ii of the Limitation Act, must necessarily include a plaintiff-respondent. That was a view in full accord with what was said by Field and Beverley, JJ., in *Soshi Bhusan Chand* v. *Grish Chunder Talugdar* (2). The ruling in this last case however though apparently not cited or considered, has been dissented from by a Bench of five Judges of the same Court; and all the other cases bearing on this point were collected by me in delivering my judgment in the recent Full Bench case of *Muhammad Husain* v. *Khushalo* (3), in which the order of the Full Court was passed on

(1) I. L. R., 7 All. 693. (2) I. L., 11 Calc. 694.
(3) *Ante*, p. 223.

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CHAJMAL DAS v. JAGDAMBA PRASAD.

the 23rd January, 1888. To the remarks I have made in this last judgment I have nothing to add, though, being bound by the decision of the majority of the Court, I agree in the order which has been made.

1888 *April* 30.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

DEBI DIN (PLAINTIFF) v. CHUNNA LAL (DEFENDANT).*

Civil Procedure Code, ss. 3, 368, 582—*Act XV of* 1877 *(Limitation Act,) sch. ii, Nos.* 171B, 178—*Death of defendant-respondent—Application by plaintiff-appellant to have representative of deceased substituted as respondent.*

Held by the Full Bench (MAHMOOD, J. dissenting) that art. 171B of the second schedule of the Limitation Act does not apply to the death of a respondent, whether plaintiff or defendant in the original suit; and that art. 178 applies to an application made by a plaintiff-appellant to bring upon the record the representative of a deceased defendant-respondent.

Narain Das v. *Lajja Ram* (1) and *Balkrishna Gopal* v. *Bal Joshi Sadashiv Joshi* (2) referred to.

Baldeo v. *Bismillah Begam* (3), and *Rameshar Singh* v. *Bisheshar Singh* (4) overruled.

Held by MAHMOOD, J., *contra*, that the word "defendant" in art. 171B includes a defendant-respondent, and, reading art. 171B with clause 2 of s. 3 in conjunction with ss. 368 and 582 of the Civil Procedure Code includes also a plaintiff-respondent; and that an application made by a plaintiff-appellant more than sixty days after the defendant-respondent's death to have the representative of the deceased made a respondent is barred by limitation, and the appeal is liable to abatement.

Soshi Bhusan Chand v. *Grish Chunder Taluqdar* (5) referred to.

This was a suit for an account of the profits of certain zamíndári property in which the plaintiff claimed a share and for the recovery of such sum with interest as might be found due on the accounts being taken. The defendant, the uncle of the plaintiff, was the manager of the property. On the 14th June, 1886, the Court of first instance (Subordinate Judge of Cawnpore) decreed the claim in respect of part of the property in suit. On the 13th August, 1886, the plaintiff appealed to the High Court from so much of the lower Court's decree as was adverse to him. On the 4th January,

* First Appeal No. 153 of 1886 from a decree of Munshi Rae Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 14th June, 1886.

(1) I. L. R., 7 All. 693.
(2) I. L. R., 10 Bom. 663.
(3) I. L. R. 9 All. 118.
(4) I. L. R., 7 All. 784.
(5) I. L. R., 11 Calc. 594.

1888, pending the appeal, the defendant-respondent Jia Lal, died, and on the 19th March an application to the Court was made on behalf of the plaintiff-appellant to the effect that the names of the four sons of the deceased respondent might be entered on the record as respondents in his place. On the 27th March, 1888, pending the disposal of this application, another application was made on behalf of the above-mentioned legal representatives to the effect that the application of the 19th of March, 1888, had not been presented within the period of limitation provided in art. 171B of the second schedule of the Limitation Act, and prayed that the appeal should accordingly be declared to have abated.

On the 28th April, 1888, the case came for hearing before Edge, C J., and Straight, J., who passed an order referring the applications of the 19th March and the 27th March, 1888, to the Full Bench for disposal together with the other cases raising similar questions of law.

The Hon. *T. Conlan*, Sheikh *Amiruddin*, and Lala *Lalta Prasad*, for the appellant.

Mr. *G. E. A. Ross* and Mr. *E. C. F. Greenway*, for the legal representatives of the defendant-respondent.

The Hon. *T. Conlan* for the appellant.—The decision of the Full Bench in *Narain Das* v. *Lajja Ram* (1) applies to this case in principle. The judgment of Straight, J., in that case was concurred in by Oldfield and Brodhurst, JJ., and it shows that art. 171B of the second schedule of the Limitation Act does not apply to the death of a respondent. The only article of the Limitation Act applicable to such a case is art. 178, and therefore the application of the 19th March was in time and that of the 27th March premature.

Mr. *G. E. A. Ross* for the legal representatives of the respondent.—In the case of *Baldeo* v. *Bismillah Begam* (2) Oldfield and Tyrrell, JJ., held that art. 171B of the Limitation Act applies to applications to have the representative of a deceased defendant-respondent made a respondent. That case is exactly in point, and it shows that those learned Judges drew a distinction between the case of a defendant-respondent and that of a plaintiff-respondent dying, and considered that *Narain Das* v. *Lajja Ram* (1) did not

(1) I. L. R., 7 All. 698. (2) I. L. R., 9 All. 118.

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govern the former class of cases. The Legislature can never have meant that while an application under s. 365 of the Code for substitutions of the legal representative of an appellants must be made within sixty days after the appellant's death, an application for substitution of a respondent might be made at any time within three years after the respondent's death.

[STRAIGHT, J.—The omission of the word "respondent" in art. 171B was probably an oversight.]

The Hon. *T. Conlan* for the appellant in reply.

EDGE, C. J.—This is an application on behalf of the plaintiff-appellant to bring upon the record the representative of the deceased defendant-respondent. The defendant-respondent died on the 4th January, 1888. This application was presented to the Court on the 19th March last. Mr. *Ross* also applied, on behalf of the legal representative of the deceased defendant-respondent, for an order directing that the appeal should abate. The question raised is whether art. 171B. of sch. ii of the Limitation Act applies to this case. It has been decided in the case of *Balkrishna Gopal* v. *Bal Joshi Sadashiv Joshi* (1) that art. 171B, sch. ii, of the Limitation Act does not apply to the case of a defendant-respondent. Having regard to the fact that by art. 171 the Legislature provided specifically for the cases of the death of an appellant or the death of a plaintiff, and there is no express reference in art. 171B to the death of a respondent, I am of opinion that art. 171B does not apply to the death of the respondent, whether that respondent was originally in the action plaintiff or defendant. I think the principle applicable to this case is the same principle which was the basis of my brother Straight's judgment in the Full Bench case of *Narain Das* v. *Lajja Ram* (2), with which, so far as the report enables us to see, at least two Judges of the Court concurred. This opinion of mine is in conflict with the judgment of Oldfield and Tyrrell, JJ., in *Baldeo* v. *Bismillah Begam* (3). It does not appear to me that Oldfield, J., who delivered judgment in that case, considered or discussed the bearing of the judgment of the majority of the Court in the Full Bench case of *Narain Das* v. *Lajja Ram* (2). Indeed, my brother Tyrrell is now of opinion that that judgment was in opposition to the decision

(1) I. L. R., 10 Bom. 663. (2) I. L. R., 7 All. 893.
(3) I. L. R., 9 All. 118.

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of the majority in the Full Bench case. My opinion is also apparently at variance with the decision of Oldfield and Mahmood, JJ., in *Rameshar Singh* v. *Bisheshar Singh* (1). I think I am bound to follow the principle which is enunciated in the Full Bench case and with which principle I agree. As in my opinion art. 171B does not apply, and as there does not appear to be any other article than 178 applicable to the case, I am of opinion that the application of Mr. *Conlan* on behalf of the appellant must be allowed, and the application of Mr. *Ross* on behalf of the legal representatives of the deceased-respondent should be refused with costs.

STRAIGHT, J.—I am of the same opinion. The learned Chief Justice has correctly interpreted the principle upon which I based my decision in the Full Bench case of *Narain Das* v. *Lajja Ram* (2). To put it shortly, that principle is this, that the word "defendant" in the art. 171B does not include a "respondent," and that consequently the period of limitation provided in that article is not applicable to the failure on the part of the appellant to bring on the record the heir of a deceased "respondent." I am of opinion that the limitation applicable to cases of this kind is that which has been stated in a Full Bench case of the Madras High Court (3), and has, as I understand it, been approved by the Calcutta High Court, (4) has also, from what we see now, met with approval by the Bombay High Court (5), and has been adopted by us.

BRODHURST, J.—I also concur with the learned Chief Justice.

TYRRELL, J.—I concur in the order made.

MAHMOOD, J.—In delivering my judgment in *Chajmal Das* v. *Jogdamba Prasad* (6), in which I concurred in the conclusion at which the learned Chief Justice and my learned brethren arrived, I had no intention to concede any principle that the ruling in the case of *Narain Das* v. *Lajja Ram* (2) could be interpreted so as to render the rule that was there laid down applicable also to the cases in which a defendant who happened also to be a respondent died, because it is to be borne in mind that in that case the appellant was defendant in the original suit. In that Full Bench case the whole of my dissentient judgment of course proceeded upon repu-

(1) I. L. R., 7 All. 734.
(2) I. L. R., 7 All. 698.
(3) I. L.R., 9 Mad. 1.
(4) I. L. R., 12 Calc. 520.
(5) I. L. R., 10 Bom. 563.
(6) *Ante*, p. 260.

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diating any distinction between a plaintiff-respondent and defendant-respondent, because I held there, at page 700 of the report, that the effect of s. 582 was to demolish the distinction between the plaintiff and defendant for purposes of the array of parties in appeal. The effect of my view was that the defendant-appellant was a "*plaintiff*," as indeed a plaintiff-appellant also would have been a "*plaintiff*," so a defendant-respondent would have been a "defendant," as also a plaintiff-respondent would be a "defendant" for the purposes of art. 171B of sch. ii of the Limitation Act. That ruling, however, had to be considered by me in conjunction with Oldfield, J., in *Rameshar* v. *Bisheshar Singh* (1) where I endeavoured to show that the Full Bench ruling in *Narain Das* v. *Lajja Ram* (2) was distinguishable from cases in which a defendant-respondent had died, and the plaintiff who was originally in the aggressive position in the first Court was also in that same position in the Court below. In that view Oldfield, J., concurred with me, though with hesitation. Exactly the same view was taken by Oldfield, J., with the concurrence of my brother Tyrrell, in *Baldeo* v. *Bismillah Begam* (3). I think these two cases are authorities for showing that a distinction does lie between the case of the death of a *plaintiff*-respondent and a *defendant*-respondent.

There is indeed the case of *Balkrishna Gopal* v. *Bal Joshi Sadashiv Joshi* (4), in which West, J., without having his attention drawn to this distinction, has applied a rule similar to that of *Narain Das* v. *Lajja Ram* (2) to the case of the death of the *defendant*-respondent. But that judgment, with all due respect for such an eminent Judge, does not seem to me to have dealt with the real difficulty in the case—*i. e.*, the effect of reading s. 3 of the Civil Procedure Code with art. 171B of the Limitation Act. That enactment, as I said in the case of *Narain Das* v. *Lajja Ram* (2) and as was said by Field and Beverley, JJ., in *Soshi Bhusan Chund* v. *Grish Chunder Talugdar* (4) is to show that "*defendant*" as it occurs in art. 171B does include a respondent.

Whether it includes a plaintiff-respondent or not is a matter undoubtedly settled by the ruling in the case of *Narain Das* v.

(1) I. L. R., 7 All. 784.
(2) I. L. R., 7 All. 693.
(3) I. L. R., 9 All. 118.
(4) I. L. R., 11 Calc. 594.

Lajja Ram (1). The rulings of the Full Bench of Madras and other High Courts to which full reference has been made by me in *Muhammad Husain* v. *Khushalo* (2), which is also a Full Bench case, need not be referred to again. But why the word 'defendant' should be interpreted as excluding a defendant who is admittedly a defendant, but happens also to be a respondent, I confess with due deference that I fail to see. These words must be understood either with due regard to s. 582 or not. If so understood, then by s. 3 of the Civil Procedure Code the '*defendant*' in art. 171B must be understood as defendant is understood in the Civil Procedure Code, and s. 582 is an essential part of that Code and defines a respondent. If the Civil Procedure Code lends us no help, then there is no rule of interpretation which would limit a term in itself general only to a defendant who does not happen to be a respondent.

In this view of course I am in a portion of my *ratio decidendi* departing from the judgment in *Narain Das* v. *Lajja Ram* (1). But it is in consequence of the opinion of the majority of the Judges that I cannot utilize the definition of '*defendant*' in s. 582 for interpreting art. 171B of the Limitation Act.

I am of opinion that inasmuch as the Full Bench case of this Court in *Narain Das* v. *Lajja Ram* (1) does not settle the exact point now before me, the word 'defendant' read with clause 2 of s. 3 of the Civil Procedure Code in conjunction with s. 582 does include a defendant-respondent, and that a plaintiff-appellant not applying within the time provided by art. 171B to bring upon the record the proper parties, is liable to the abatement of his appeal within the meaning of s. 368 of the Civil Procedure Code read with s. 582. I would therefore allow the application made by the heir of the deceased, and I would declare that this appeal should abate with costs.

As to the second application, *viz.*, that made by Mr. *Conlan*, it follows from what I have said that that application cannot be maintained, and those reasons are in principle the same as those stated by me in the case of *Narain Das* v. *Lajja Ram* (1) as also in my recent judgment in *Muhammad Husain* v. *Khushalo* (2). It is an application which admittedly having been made after the lapse

(1) I. L. R. 7 All. 693. (2) *Ante*, p. 228.

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of sixty days as provided by art. 171B is an application which cannot be entertained, because we should then be placing upon the record of an appeal which has abated persons who are the heirs of deceased respondents. I would therefore reject that application (1).

1889 *April 30.*

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

RAM SARUP (DEFENDANT) v. RAM SAHAI AND ANOTHER (PLAINTIFFS).*

Act XV of 1877 (*Limitation Act*), *sch. ii., Nos.* 171*B*, 178—*Death of plaintiff-respondent—No application for substitution—Application by defendant-appellant for hearing of appeal.*

Held by the Full Bench that inasmuch as art. 178 and not art. 171B of the second schedule of the Limitation Act applied to the case of a deceased respondent whether plaintiff or defendant in the suit, an application by a defendant-appellant to have his appeal heard in the absence of any representative of the deceased plaintiff-respondent could not be allowed until the period prescribed by art. 178 had expired without the legal representatives of the deceased applying to be brought on the record in his place.

This was a second appeal which came for hearing before Brodhurst and Mahmood, JJ., who on the 24th March, 1888, passed the following order :—

"In this case Mr. *Kashi Prasad*, on behalf of the appellant, states that one of the plaintiffs-respondents, Ram Sahai, died more than sixty days ago, and that the other plaintiff-respondent, Sadho, is not to be found. Upon this state of things the learned pleader contends that his client, Ram Sarup, being defendant-appellant, was not bound to make any application to implead any person as respondent to the suit as legal representative of the plaintiff-respondent, and that, there being neither any right to apply for such substitution of parties nor any period of limitation applicable thereto, the result would be that the suit will abate, and that the decree of the lower appellate Court should be reversed. The point so raised is very similar to that which has arisen in some other cases, such as *Chajmal Das* v. *Jaydamba Prasad* (2), which is to be considered, by the order of the learned Chief Justice, by a Bench of three Judges. We think that this case should also be disposed of

* Second Appeal No. 2046 of 1886 from a decree of Rai Mata Din, Officiating Additional Subordinate Judge of Ghazipur, dated the 29th May, 1886, reversing a decree of Syed Zain-ul-abdin, Munsif of Koraitadih, dated the 5th December, 1885.

(1) See Act VII. of 1888, s. 66 (4). (2) *Ante* p. 260.

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by the same Bench, and with this recommendation we direct it to be laid before the learned Chief Justice for orders."

The case was ultimately referred to the Full Bench by an order dated the 28th April, 1888.

Munshi *Kashi Prasad* and Lala *Juala Prasad*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

EDGE, C. J.—In this case one of the two plaintiffs-respondents died pending the appeal. Three years have not expired since the day of his death. The defendant-appellant applies to have his appeal heard in the absence of any representative of the deceased plaintiff-respondent. For the reasons stated by the majority of this Court in *Muhammad Husain* v. *Khushalo* (1), I am of opinion that we should not accede to this request until we have the proper parties on the record. We have held that art. 178 and not art. 171B applies to the case of a deceased respondent, be he plaintiff or defendant in the suit. In my opinion the motion should be refused.

STRAIGHT, J.—I am of opinion that the contention of Mr. *Kashi Prasad*, which has been referred to this Full Bench by the Divisional Bench for disposal, should be decided against him, and that he should not be allowed to proceed with the trial of this appeal, and to have it decreed as against the respondent who has died since the institution of the appeal, until the period of limitation provided for in art. 178 of the Limitation Law has expired and the legal representatives or heirs of such deceased respondent have failed to make such application to be brought on the record. That contention of the learned pleader for the appellant in the appeal must be taken to be disposed of, and the case will come on in due course.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight.

TYRRELL, J.—I concur.

MAHMOOD, J.—Feeling myself bound by the opinion of the majority, I must bow to the conclusion at which they have arrived. I concur in the order which they have made (2).

(1) *Ante*, p. 223. (2) See Act VII of 1888, s. 66 (4).

P. C,
J. C.
1887
December 5th, 6th, 7th, and 8th.

1888
January 21st.

PRIVY COUNCIL.

SARTAJ KUARI AND ANOTHER (DEFENDANTS) *v.* DEORAJ KUARI, MOTHER AND GUARDIAN OF LAL NARINDAR BAHADUR PAL (PLAINTIFF).

[On appeal from the High Court for the North-Western Provinces.]

Custom—Impartible estate—Right of possessor of impartible estate to alienate.

There is no such co-parcenary in an estate impartible by custom, as, under the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth.

The son's right at birth, under the Mitakshara, is so connected with the right to share in, and to obtain partition of, the estate, that it does not exist independently of the latter right.

Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.

In regard to a *ráj* estate in Gorakhpur, by custom impartible and descending by primogeniture, the family being in other respects governed by the Mitakshara law, the present Raja's alienation of part of that estate was alleged by his son to be invalid as against him.

Held that if there had been no custom of impartibility, the Rája's power over the estate would have been restricted by the law declared in Mitakshara, ch. I, s. 1, v. 27; and the gift would have been void. But, there being the above custom, the question was how far the general law was superseded, and whether the right of the son to control the father's act in this respect was beyond the custom.

Held that in regard to impartible estate, the son's right at birth did not exist where there was no right on his part to partition; also that inalienability depended on custom or on the nature of the tenure. In this case the evidence did not establish that by custom the estate was inalienable.

APPEAL from a decree (4th May, 1883) of the High Court affirming a decree (2nd October, 1880) of the Subordinate Judge of Gorakhpur.

The question was of the validity of a gift of seventeen villages in Gorakhpur, forming part of the hereditary and impartible ráj estate in the possession of the Rája of Mahauli. It was in favour of a younger wife, and was disputed by the Rája's eldest son, still a minor, represented by his mother and guardian.

The instrument which the son sought to have declared void was dated the 18th February, 1871.

It recited that Rája Bhawani Ghulam Pal was the proprietor of a number of villages in the pargana of Mahauli, constituting

Present: LORD FITZGERALD, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

his ráj estate, which had been settled with him for the revenue; and that he was, with regard to the nature of the ráj and riasat, and also with regard to the custom and usage of the family and of the country, the sole permanent proprietor having full power to transfer the estate. The instrument then declared that the Rája thereby made a gift to his wife, Ráni Sartaj Kuari, of the seventeen villages described therein, forming part of his "ilaka," and had put her into possession, she having full proprietary rights therein and being entitled to obtain *dakhil kharij*.

The plaintiff's ground of claim was that, by Hindu law and usage, the Rája had no power to alienate any part of the ráj estate. The Rája denied this, alleging in his defence a right to make any transfer; adding that, in consequence of the separation of members of the family, and for other reasons, transfers of every description had been made of the ráj estate from of old.

The judgment of the Court of first instance was against the validity of the alienation.

On appeal the High Court (Straight, J., and Tyrrell, J.) gave judgment as follows:

"The case is one of considerable moment, not only from the value of the property in suit, but the importance of the legal questions involved as to the precise character of the property of the ráj and the power of the Rája in regard to it. Before addressing ourselves to the points raised for our determination, a few words may be conveniently devoted to recording the history of this Mahauli ráj. The estates, which are considerable, lie in the parganas of Tanda and Akbarpur, Fyzabad, in the province of Oudh, and Mahauli and Rasulpur, in the district of Basti, in these Provinces. It would appear that some 300 years ago two brothers, by name Alakdeo and Tilakdeo, Surajbansi Rájputs, hailing, so they alleged, from Kumaun, invaded the locality in which the property above mentioned is situate, and, killing one Kaulbil, the then Rájbhar, appropriated his lands and made them the nucleus of the present ráj. Subsequently, for services rendered or for some other reason, they obtained from one of the Delhi Emperors the title of "Pal," which has now for a long course of years attached to the family. Originally the dwelling-house of

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the Rája was in the village of Mahauli, but it was afterwards removed to Mahson, where it now is situated. The seventeen villages to which the deed of gift in favour of Rání Sartaj Kuari relates are nearly all situated in Mahson, and are estimated, in round figures, to be worth some five lakhs of rupees and form, so the plaintiff alleges, the most valuable part of the ráj properties. The names of the several Rájas who have preceded the present incumbent in their order are, as far as we have been able to ascertain them,—(1) Dip, (2) Jaswant, (3) Kalandar, (4) Bakhtawar, (5) Sarfraz, (6) Shamshere, and (7) Mardán, father of the defendant Ghulam and grandfather of the plaintiff. Of the above, with the exception of Kalandar, who is said to have been selected in preference to his elder brother Zorawar, though the evidence as to this is of the vaguest and most unsatisfactory kind, succession to the *gaddi* has been ruled by primogeniture.

"We now revert to the contentions urged by the appellants' counsel in support of the appeal. Briefly they are—1st, that the plaintiff has no title to come into Court during his father's lifetime, for he is neither a co-proprietor nor a reversioner; 2nd, that if he has a right to institute a suit, it rests with him to establish the inalienability of the ráj, and that under any circumstances the defendants have conclusively proved the competence of the Rája to make the gift impeached. The first question involves the consideration of many points of no slight difficulty and complexity, and their examination has been not a little perplexed by a perusal of the numerous authorities to which we were referred in the course of the arguments at the hearing of the appeal. Putting aside the suggestion of custom or usage made in the plaint, which we do not feel called upon to discuss, the position asserted by the plaintiff apparently resolves itself into this:—'The estate now in possession of my father is ancestral; he and I are members of a joint Hindu family, ordinarily subject to the law of the Mitakshara. If I survive him, I must under that law succeed to the estate. Although it is admittedly impartible in the sense that I cannot demand partition thereof, or have joint enjoyment of the income derived therefrom, yet I have, so to speak, a limited proprietorship therein in the shape of rights to maintenance and succession by survivorship.' In other words, the plaintiff claims that, except in so far as from the

nature of the estate they are inapplicable, his case must be determined according to the principles of the Hindu law which govern families and their property. As a matter of first impression, it appears to us that this contention is based on grounds of justice and good sense, but it will be convenient at once to see how far authority supports it."

The judgment of the High Court then quoted passages from several judgments of the Judicial Committee, of which the effect is given by their Lordships in their judgment. They are therefore here omitted. The cases referred to by the Judges of the High Court were *Katama Natchiar* v. *The Rája of Shivagunga* (1); *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (2); *Stree Rájah Vanumula Venkayamah* v. *Stree Rájah Vanumula Boochia Vankondora* (3); *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (4); *Periasami* v. *Periasami* (5); *Doorga Persad Singh* v. *Doorga Konwari* (6).

To the Judges of the High Court it seemed that the principles laid down by the Judicial Committee established that a ráj, or impartible zamíndári, might be a portion of a joint family estate; and that, in the absence of a custom to the contrary, succession to it would be regulated by the ordinary rules of Hindu law. And they added: "The conclusion to be deduced, as it appears to us, from the observations of their Lordships is that where there is no local or family custom overriding the general law, the succession to a ráj, or impartible zamíndári, according to Hindú law, goes by primogeniture. There is one other decision of the Privy Council—*Doorga Persad Singh* v. *Doorga Konwari* (6), in which the passage from the Shivagunga case is quoted with approval, and where the following material remarks to the question under our consideration occur:—"The impartibility of the property does not destroy its nature as joint family property, or render it a separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death, in preference to those who would be his heirs if the property were separate." In this connection we may also refer to the judgment reported in 13

(1) 9 Moo. I. A. 543 at pp. 588, 592.
(2) 12 Moo. I. A. 523.
(3) 13 Moo. I. A. 333.
(4) 14 Moo. I. A. 570.
(5) L. R. 5 I. A. 61.
(6) I. L. R. 4 Calc. 201; L. R. 5 I. A. 149.

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Moore's Indian Appeals, page 333, in the course of which it is observed :—"It is therefore clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession to separate estate." So in *Periasami* v. *Periasami* (1), it is said :—"He would, therefore, necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers; the latter taking such right and interests in respect of maintenance and possible rights of succession as belong to the junior members of a ráj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was up to the year 1829 in a sense the joint property of the joint family of the three brothers."

"We have thought it right to quote at this length from these Privy Council rulings, because the counsel for the appellants greatly pressed upon us a case to be found at page 523 of the 12th Vol. of Moore's Indian Appeals, which is known as the Tipperah case, and particularly the following passage on page 540 :—'Still, when a ráj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction also involving a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership." With deference, we can only remark that we find ourselves wholly unable to reconcile this view of the matter with the opinions expressed in the other judgments of their Lordships from which we have quoted, and by which in every aspect of the question before us we prefer to be guided. An impartible ráj or zamíndári must, it seems to us, be one of two things—either a separate estate conferring independent and absolute proprietary powers and carrying its own special rules of succession, or a joint ancestral estate pertaining and belonging to a joint undivided family. Because it is impartible it is not necessarily separate, for its impartibility does not 'destroy its nature as joint family property,' nor does it 'make the succession follow the succession of separate estates.' If, then, it can be considered joint property, is it to be so merely in name? It must be conceded that the complete rights

(1) L. R. 5 I. A. 61.

of ordinary co-parcenership in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in, or, perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership. This is matter, however, more pertinent to the second question we shall presently have to consider. As to the first—namely, the competency of the plaintiff to maintain this suit—we think that, in the absence of any custom to the contrary, he and his father being Hindús and members of a joint Hindu family, and, as such, subject to the law of the Mitakshara, the estate pertaining to the ráj of Mahauli must be regarded as joint family property, in which he has an immediate present interest and a right of succession as eldest son. In this view of the matter the first contention urged for the appellant fails.

"In support of his second point—namely, that the onus was on the plaintiff to establish the inalienability of the ráj—the counsel for the appellant referred us to *Rája Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (1). We have very carefully perused that ruling of their Lordships of the Privy Council, as also the judgment of the High Court of Calcutta, from whose decision the appeal was preferred, and it seems to us sufficient to say that the property to which the litigation related was situated in Lower Bengal, where the parties would be subject to the Dayabhaga and not the Mitakshara. Under the general law, therefore, by which they were governed, the Rája had power to make alienations, and it was for those who denied his right to do so to establish a custom of inalienability that would override the general law. In the case before us, however, the Mitakshara is the law of the parties; and if we have correctly held that the Mahauli Ráj estate is joint family property, then, save for urgent or necessary expenses of the family, no one member, even though he stands in the position of father or manager, can alienate it or any part of it without the consent of all. Such at least is the view of the Hindu law that has been always recognised by this Court in a long and, as far as we know,

(1) L. R. 8 I. A. 248; I. L. R. 8 Calc. 199.

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unbroken series of decisions from which we should hesitate to depart. It cannot be pretended that an absolute gift of seventeen of the best and most valuable villages of the ráj to a junior wife is within the exception. On the contrary, to recognise such a power in a Hindu father would defeat the first principles of the Hindu law of inheritance and render the continuance of the joint family system impossible. We put it to the counsel for the appellant in the course of his argument, that if he carried it to its logical conclusion, a Rája might dissipate the whole of his ancestral estate, and of his own free will extinguish the ráj; and he frankly admitted that he did not shrink from going that length. If for a moment we can entertain questions of policy, we doubt the expediency or propriety of allowing any such doctrine to go abroad. Looking at the matter in its practical aspect, and having regard to the origin and growth of these small powers or principalities, which are not without purpose or usefulness, we are not prepared to admit, at any rate so far as the law governing these Provinces is concerned, except where it is clearly overridden by well-recognised family custom, any such absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property. For to do so would involve the inconsistency that while the Rája, or incumbent for the time being, in no way controls the succession after him, he may nevertheless effectually deprive his successor of anything to succeed to. Until corrected by higher authority, we must hold that the law of the Mitakshara is applicable to the present case, and that the defendant Rája, and the minor plaintiff, being members of a joint Hindu family, and the estate of the ráj being joint ancestral property, the alienation impeached by this suit, not having been made for necessary purposes, is void and must be set aside.

"It only remains for us now to deal with the third contention put forward by the appellant's counsel, namely, that a custom has always existed in the Mahauli ráj whereby the Rája for the time being can make alienations of the character challenged in this suit, and that this has been done over a long course of years. They contended that the custom has been well established by their evidence; that some of these witnesses are alienees in possession of parts of the estate conferred on them under the operation of this

custom by former Rájas; that no evidence was offered on the other side to contradict or qualify this testimony; and that it is not shown that objection was ever taken to any act of alienation previous to that which is the subject of this action."

In regard to the evidence relating to custom, the Judges said—

"We have to determine whether this evidence sufficiently shows (1) that previous Rájas had, by custom and usage, the absolute uncontrolled powers over the estate claimed by the defendants; (2) that they exercised such powers; (3) that they exercised them in the way and to the extent of the present alienation; and (4) that this custom is not only ancient and certain, but is also reasonable in itself as well as invariable and uncontradicted in its application;" and they concluded thus:—

"Having carefully considered this testimony, we cannot find that it establishes the fact, much less the custom, of any alienation so large in its scope, and so absolute in its character, as that made by the present Rája in favour, exclusively and for ever, of his younger Ráni. We are told of settlements on cadets of the Rája's house *(Babuai)*: of pious and charitable gifts *(birt, shankalap,* and *muafi)*, and of life allowances for maintenance or education of young Bábus. We hear nothing of such an alienation as is challenged on behalf of the Rája apparent in this action, nor do we find anything to show assertion by any Rája, prior to the father of the plaintiff, of a right or title to permanently transfer the estate attaching to the ráj. It remains to see how the documentary evidence helps the defendants' case. It is sufficient to say that it does not carry it a step beyond the point reached by the oral testimony. It indicates transfers by Rájas of certain bighas in mauzas by way of religious and charitable grants 'under the usual *birt* conditions and limitations:' transfers of waste lands to Ránis and others to bring into cultivation on a muafi tenure; and gifts of parts of mauzas or of an entire mauza to 'Bábus' in virtue of their *Babuai* right. There are two cases only that wear an apparently different aspect. These are the alleged 'gifts' to the prostitute Musammat Roshan and to Ráni Taliwand Kuari. The latter extended to three mauzas only, and the deed of gift has not

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been produced. We have noticed above the circumstances which favour the theory that it was not an absolute and perpetual conveyance of this property to the Ráni, the donee, but partook rather of the character of a life settlement on her and *Babnai* for the sons she had borne to the Rája, donor; but even if it were, one such exceptional instance would be wholly inadequate to establish the custom prayed in aid by the defendants.

"As to the prostitute's gift that conveyed to her 'the muafi rights and interests' in one village only, mauza Koharwa, as her '*birá* property,' for which she paid malikana to the Rája, it is needless to point out that this differed *toto cœlo* from the assignment in perpetuity under the deed which is assailed in the present litigation. We are of opinion, for the foregoing reasons, that this appeal fails and should be dismissed with costs, and we order accordingly."

On this appeal,

Mr. *R. V. Doyne*, for the appellants, argued that the judgment of the High Court was erroneous, and that the gift made by the Rája was valid. The plaintiff could not allege that he had an estate in the nature of a share in joint family property, the ráj estate being impartible, and the plaintiff being, at most, entitled to maintenance. Also, on the evidence, it was clear that so much of the estate had been alienated from time to time, without objection made by any son or other expectant heir, that the proof of the custom affirming the right to alienate outweighed that of a custom to the contrary. It should, therefore, have been held that the Rája had power to alienate, and was not controlled in the exercise of such power by his son. No interest in impartible estate attached to a son at birth. That right in the case of impartible estate did not, whatever the son's rights were, commence at his birth, as in the case of ordinary estates under the Mitakshara, and there remained no reason for distinguishing such a case as the present from those already disposed of, by the Bengal High Court, in favour of the liberty of alienation. It had not been proved that custom prohibited such an alienation as had been made; on the contrary, the estate was shown to have been reduced in this way to less than it formerly was. Reference was made to *Rája Ram-*

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Ramnarain Singh v. *Pertum Singh* (1), *Maharáni Hiranath Koer* v. *Baboo Ram Narayan Sing* (2), *Thakoor Kapilnath Sahai Deo* v. *The Government* (3), which cases it was contended were distinguishable from the present, as they related to ancestral estate not diminished by alienation. *Rája Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (4), *Stree Rájah Yanumula Venkayamah* v. *Stree Rája Yanumula Boochia Vankondora* (5), *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (6). There was no ground for applying the Mitakshara rule as to sons controlling their father's alienation to an impartible ráj estate, large portions of which had been subjected to customary alienation.

Mr. *F. H. Jeune* and Mr. *Reginald C. Saunders*, for the respondent, argued, in support of the judgment of the High Court, that the Rája's alienation was invalid. The ráj estate was by custom impartible and descended to the eldest son; but the custom prevailed only to this extent; and no right of alienation, save to make such usual gifts as were made by way of *birt*, or for pious purposes, or other objects, such as maintenance of dependents, or moderate grants incidental to the Rája's position, had been shown to exist by custom. The gifts in question did not answer that description. Although by custom the right of succession belonged only to one member of the family at a time, the other members might in their turn succeed, and were also entitled to be maintained out of the income of the estate. Thus there was a joint interest in the estate, although there was no right to demand a partition. The custom regulating the inheritance only to a certain extent, the law of the Mitakshara, as a necessary result, prevailed as to all other rights.

It was not contended that the ráj estate was inalienable only because it was impartible, but it was argued that it was inalienable in the absence of any proved custom of alienation, the ancient Hindú ráj not admitting, save in the above exceptional cases, and for reasons of necessity, such as the general law regarded, alienation of the family estate. Although it was impartible, it was not separate estate; and in a qualified, if not in the full, sense it was joint family estate. In place of the ordinary right of partition,

(1) 11 B. L. R. 397.
(2) 9 B. L. R. 274.
(3) 13 B. L. R. 445.
(4) L. R., 8 I. A., 248; I. L. R. 8 Calc. 199.
(5) 13 Moo. I. A. 333.
(6) 12 Moo. I. A. 523.

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there stood the special rule of inheritance, but beyond this customary rule, there was a community of interest derived from the general law; and the estate remained that of a joint family, in which each member, being entitled to interest from his birth, and to his turn of succession, had a joint interest. The question in this appeal, in effect, resolved itself into whether the burden of proving the custom, sufficiently to displace the Mitakshara law, had been discharged or not. They contended that to prove this custom of alienation was a burden cast upon those who supported it, and that it had not been discharged.

Reference was made to *Katama Natchiar* v. *The Rája of Shivagunga* (1), *Sri Rájah Yenumula Gavuridevamma Garu* v. *Sri Rája Yenumula Ramandora Garu* (2), *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (3), *Stree Rája Yanumula Venkayamah* v. *Stree Rája Yanumula Boochia Vankondora* (4).

The cases from the Bengal Law Reports cited in the argument for the appellants were also referred to.

Mr. *R. V. Doyne*, for the appellants, was not called upon to reply.

Their Lordships' judgment was delivered by Sir R. COUCH.

SIR R. COUCH.—The question in this appeal is whether a gift of seventeen villages made by the appellant Raja Bhawani Ghulam Pal, on the 18th February, 1887, to the appellant, Rání Sartaj Kuari, his younger wife, is valid. The suit was brought by the respondent, as mother and guardian of Lal Narindar Bahadur Pal, the minor son of Bhawani Ghulam Pal, against the appellants. The plaint stated that the estate of Mahauli had been in the plaintiff's family for a very long time, and, according to the custom of the country and its neighbourhood and the provisions of Hindu law, the oldest son of the Rája succeeds to the estate; that since the establishment of the ráj up to the time of bringing the suit, according to the provisions of Hindu law and the prescriptive and recognised usage, the successor of the Rája and occupant of the *gaddi* had had no other right under any circumstances except to enjoy

(1) 9 Moo. I. A. at p. 588.
(2) 6 Mad. H. C. 93.
(3) 12 Moo. I. A. 523.
(4) 13 Moo. I. A. 333.

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possession of the estate during his lifetime, and use its income in maintaining his own respectability and dignity of the estate and in support of the members of the family, leaving the whole estate at the time of his death to his successor. The plaint then stated the gift and prayed for a decree for establishment and declaration of the plaintiff's right by voidance of the deed of gift. The written statements of the defendants alleged that Bhawani Ghulam Pal was proprietor of the estate and authorized to make any transfer, and it would be proved on inquiry that, on account of the separation of the family and other reasons, transfers of every description had been made in the family from of old, without any objection or obstruction being offered.

The history of the family is given in the judgment of the High Court. The estates, which are considerable, lie in the parganas of Tánda and Akbarpur, Fyzabad, in the Province of Oudh, and Mahauli and Rasalpur in the district of Basti, in the North-Western Provinces. It would appear that, some 300 years ago, two brothers, named Alakdeo and Tilakdeo, Surajbansi Rájputs, coming, as they alleged, from Kumaon, invaded the locality in which the property is situated, and killing one Kaulbil, the then Rájbhar, appropriated his lands and made them the nucleus of the present ráj. Subsequently, for services rendered or for some other reason, they obtained from one of the Delhi Emperors the title of "Pal," which has now for a long course of years been attached to the family. It was admitted that the ráj or estate was impartible; that there was in the family the custom of primogeniture; and that the family was governed by the law of the Mitakshara. The evidence as to the size of the estate originally was very vague, some witnesses saying it contained 600 or 700 villages and others 1,300. At the time of the gift in question it did not contain more than 100. The estate had been thus reduced by gifts by successive Rájas to younger members of the family, who were called Bábus, for maintenance, and to Brahmins for religious or charitable purposes. The former classes of gifts were called "birt" and the latter "shankalp." The former were stated by the witnesses to have been of considerable extent, some being of 50 or more villages. It did not appear that a Rája had ever made an alienation by way of

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sale of any part of the estate. The Subordinate Judge framed the following issue :—

"Is the defendant competent to execute the deed of gift during his lifetime in favour of his second wife according to the family custom and Hindú law? Is the deed of gift legal? Has the plaintiff no right, according to Hindu law, to get it cancelled? Is the plaintiff alone competent to sue in the presence of other rightful heirs, and is the plaintiff's claim legal or not?" The Subordinate Judge decided that the deed of gift was invalid and made a decree for the plaintiff. He appears to have held that, the estate being impartible, it must also be inalienable, unless it was proved that the custom of making transfers had been prevalent in the family, and that the defendant had failed to prove this.

The defendants appealed to the High Court. That Court held that, in the absence of any custom to the contrary, the plaintiff and his father being Hindús and members of a joint Hindu family, and as such subject to the law of the Mitakshara, the estate pertaining to the rāj of Mahauli must be regarded as joint family property in which he had an immediate present interest and a right of succession as eldest son. And they said that "they were not prepared to admit, at any rate so far as the law governing these (the North-West) Provinces is concerned, except where it is clearly overridden by well-recognised family custom an absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property," and that the defendant Rája and the minor plaintiff, being members of a joint Hindu family, and the estate of the rāj being joint ancestral property, and the law of the Mitakshara being applicable, the gift, not having been made for necessary purposes, was void and must be set aside. Accordingly the appeal was dismissed with costs.

A similar view of the law was taken by the High Court at Calcutta in *Rájah Ramnarain Singh* v. *Pertum Singh* (1).

The great distinction between the doctrine of the Mitakshara in regard to heritage and that of the Dayabhaga, the law in Bengal, is found in ch. 1, sec. 1, v. 27, where it is said that property in the paternal or ancestral estate is by birth, and the

(1) 11 B. L. R., 397.

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father is subject to the control of his sons and the rest in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor. In this case, if there were no family custom, the Rája's power over the estate would be governed by this law, and the *gift* in question would be void. But, as was said by this Committee in the Tipperah case, 12 Moore I. A. 542, "where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom." It is admitted that the ráj is impartible, and that there is a custom of succession by primogeniture. The question how far the general law of the Mitakshara is superseded and whether the right of the son to control the father is beyond the custom is one of some difficulty.

The Judges of the High Court have quoted in support of their view passages from several judgments of this Committee. In all of them the question was as to the succession to the property on the death of the Rája or zamíndár, and it was held that, for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family. The saying in the *Shivaganga* case (1) "the zamíndári, though impartible, was part of the common family property," must be understood with reference to the question which was then before their Lordships. The question of the right of an eldest son or other son to control the father did not arise in that case. In *Periasami v. Durga Kunwari* (2) it is evident from what is quoted by the High Court that this question was not considered. In *Periasami v. Periasami* (3) the language is more guarded. It is said that the estate, though impartible, was up to the year 1829 in a sense the joint property of the joint family of the three brothers. The sense is shown by the previous sentence to be the younger brothers "taking such right and interests in respect of maintenance and possible rights of succession as belong to the junior members of a ráj or other impartible estate descendible to a single heir." In *Rajah Yanumula Venkayamah v. Rajah Yanumula Boochia Vankondora* (4), which was quoted in the argument for the respondent for a passage in the judgment at p. 339, where the estate is spoken

(1) 9 Moo. I. A., at p. 593.
(2) I. L. R. 4 Calc., 201.
(3) L. R. 5 I. A., 61.
(4) 13 Moo. I. A. 333.

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of as being part of the common family property, though impartible, the question in the suit being in regard to the succession, their Lordships at p. 340, after noticing evidence of the grants of portions of the estate, say: "These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a ráj or impartible estate in favour of the junior members of the family, who but for the impartibility of the estate would be co-parceners with him." This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the Mitakshara law is created by birth does not exist.

And in *Baboo Beer Pertab Sahee* v. *Mahárája Rajender Pertab Sahee* (1), the case of the zamíndári of Hansapore in Behar, where the Mitakshara law prevails, an impartible ráj, which by family usage and custom descended according to the rule of primogeniture, subject to the burthen of making Babuana allowances to the junior members of the family for maintenance, the question was whether the Rája had power to make a testamentary disposition of the ráj to one member of his family to the prejudice of his other male descendants and co-heirs, their Lordships held that the foundation of the supposed restriction on the power of the father to make a will was the community of interest which the members of the family acquired by birth, and said "*cessante ratione legis cessat et ipsa lex.*"

The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons. "Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common." (Mitakshara, ch. 1, s. 1., v. 30).

The argument in support of the view of the High Court appears to be that although the sons do not take an interest by birth, so as to enable them to hold the estate or to have a partition, they have, as members of a joint family, some interest which is sufficient

(1) 12 Moo. I. A., 1.

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to enable them to prevent an alienation. The learned Judges of the High Court say: "It must be conceded that the complete rights of ordinary co-parcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, are merged in, or perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

In the case in the 11th Bengal L. R. 397, it seems to have been considered that the son was a co-sharer with the father. It is said (p. 405) in the judgment: "It appears to me, then, on the facts with which we have to deal, that we must take the property which is the subject of suit to have been ancestral property, which descended with the joint family in the ordinary way, subject to the effect of an established custom in regard to its partibility amongst the existing joint members of the family, and in this view of the facts it is evident that the father had no power against his son, who was unquestionably joint with him as regards this property, to alienate or incumber the estate excepting upon a justification of a family necessity." Both Courts appear to have thought that, in order to prevent alienation by the father, there must be a co-ownership in the son or sons.

The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, so connected with the right to a partition that it does not exist where there is no right to it. In the Hansapore case there was a right to have Babuana allowances as there is in this case, but that was not thought to create a community of interest which would be a restraint upon alienation. By the custom or usage the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership, which is a restraint upon alienation. It is not so difficult where the holder of the estate has no son, and it is necessary to decide who is to succeed. In

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Bengal there is joint family property, but where property is held by the father as its head, his issue have no legal claim upon him or the property except for their maintenance. He can dispose of it as he pleases, and they cannot require a partition. The sons have not ownership while the father is alive and free from defect. Upon his death the property in the sons arises, and with it the right to a partition: Dayabhaga, ch. 1. In the case of the ráj of Patcum in Chota Nagpore, which was admitted to be an impartible ráj, and one in which the custom of primogeniture existed, it was held by the High Court at Calcutta (1) that it was necessary for the plaintiff to show that there was some custom which would prevent the operation of the general law, empowering alienation, and that proof of a custom that the estate descended to the eldest son to the exclusion of the other sons was not sufficient. On an appeal from this judgment this Committee was of opinion that it should be affirmed (2). *In Narain Khootia* v. *Lokenath Khootia* (3) it was held by the same High Court that the fact that the ráj of Chota Nagpore is impartible does not prevent the Mahárája for the time being from making grants of portions of it in perpetuity. And it is stated in the judgment that the family is governed by the law of the Mitakshara. It had been previously held by the same Court in a case in 13 Bengal L. R. 445, where the plaintiff alleged that the descent of the estate was governed by Mitakshara law, and that by the usage and custom of the family the estate was impartible and descendible according to the law of primogeniture on the male heirs of the original grantee, the estate was not on the case stated shown to be inalienable. Their Lordships think this is the correct view.

If, as their Lordships are of opinion, the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom, which must be proved, or, it may be in some cases, upon the nature of the tenure. The Subordinate Judge and the High Court thought that the onus was upon the defendants (the appellants) to prove that by custom the estate was alienable, and they have found that the custom was

(1) I. L. R. 5 Calc. 113. (2) L. R. 8 I. A. 248.
(3) I. L. R. 7 Calc. 461.

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not proved. Their Lordships have not to consider whether these concurrent findings should be questioned. They have to see whether it is proved that there is a custom of inalienability. The fact that there is no evidence of a sale of any portion of the estate is in the plaintiff's favour, but this is not sufficient. The absence of evidence of an alienation without any evidence of facts which would make it probable that an alienation would have been made cannot be accepted as proof of a custom of inalienability. For the foregoing reasons, their Lordships are of opinion that the plaintiff has failed to show that the gift ought to be declared to be invalid, and they will humbly advise Her Majesty to reverse the decrees of the lower Courts, and to decree that the suit be dismissed with costs in both these Courts. The respondent will pay the costs of this appeal.

Solicitors for the appellants: Messrs. *Ford, Ranken Ford*, and *Ford*.

Solicitors for the respondents: Messrs. *Bird* and *Moore*.

APPELLATE CIVIL.

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April 7.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.

MUHAMMAD ALLAHDAD KHAN AND ANOTHER (PLAINTIFFS) *v.* MUHAMMAD ISMAIL KHAN AND OTHERS (DEFENDANTS).*

Muhammadan Law—Inheritance—Legitimacy—Acknowledgment of sonship—Practice—Remand—Civil Procedure Code, ss. 562, 563, 564, 566.

Per EDGE, C. J., and STRAIGHT, J.—The rules of the Muhammadan law relating to acknowledgment by a Muhammadan of another as his son are rules of the substantive law of inheritance. Such an acknowledgment, unless certain impediments exist, confers upon the person acknowledged the status of a legitimate son capable of inheriting. Where there is no proof of legitimate birth or of illegitimate birth, and the paternity of a child is unknown, in the sense that no specific person is shown to be the father, then the acknowledgment of him by another who claims him as a son affords a conclusive presumption that he is the legitimate child of the acknowledger, and places him in that category. Such a status once conferred cannot be destroyed by any subsequent act of the acknowledger or of any one claiming through him.

* Appeal No. 1 of 1888 under s. 10 of the Letters Patent.

MUHAMMAD ALLAHDAD KHAN v. MUHAMMAD ISMAIL KHAN.

Per MAHMOOD, J.—Although, according to the Muhammadan law, *ikrar* or acknowledgment in general stands upon much the same footing as an admission as defined in the Evidence Act, acknowledgments of parentage and other matters of personal status stand upon a higher footing than matters of evidence, and form a part of the substantive Muhammadan law. So far as inheritance through males is concerned, the existence of consanguinity and legitimate descent is an indispensable condition precedent to the right of succession, and such legitimate descent depends upon the existence of a valid marriage between the parents. Where legitimacy cannot be established by direct proof of such a marriage, acknowledgment is recognised by the Muhammadan law as a means whereby marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of a lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledger, and there is nothing in the Muhammadan law similar to adoption as recognised by the Roman and Hindu systems, or admitting of an affiliation which has no reference to consanguinity or legitimate descent. A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimatised by acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time, with reference to the legitimacy of the child's birth, is a matter of uncertainty.

Ashruf-ood-Dowlah Ahmed Hossein Khan v. *Hyder Hossein Khan* (1), *Muhammad Azmat Ali Khan* v. *Lalli Begam* (2), and *Sadakat Hossein* v. *Mahomed Yusuf* (3) referred to.

In a suit for possession of property by right of inheritance, the Court framed six issues, four of which it tried and decided. With reference to its finding upon the principal of these issues, which related to the plaintiff's legitimacy, the Court dismissed the suit, observing that, in the view which it took of the case, the determination of the remaining issues was unnecessary. Some of the defendants had filed a statement of defence upon which no issues were framed, and no evidence taken, apparently in consequence of the attention of the Court being directed almost exclusively to the main issue as to the plaintiff's legitimacy. There was no formal order excluding evidence on any point. On appeal, the High Court reversed the first Court's finding on the issue with reference to which the suit had been dismissed below.

Held by EDGE, C. J., and MAHMOOD, J., (STRAIGHT, J., dissenting) that s. 562 of the Civil Procedure Code applied not only to cases where the first Court had expressly excluded evidence, but also to cases where the parties were or might have been misled by the act of the Court as to the issues or the evidence necessary, and where, in consequence of the Court erroneously considering one issue only, the parties did not tender or bring forward their evidence; and that, as in the present case, evidence had been excluded in this broad sense, s. 562 (the operation of which in such cases should be rather expanded than limited) was applicable, and the case should be remanded for trial of the remaining issues.

(1) 11 Moo. I. A. 94. (2) L. R. 9 I. A. 8; I. L. R. 8 Calc. 422.
(3) L. R. 11 I. A. 31; I. L. R. 10 Calc. 663.

Held by STRAIGHT, J., *contra*, that, with reference to ss. 562, 563, and 564, the case could not be remanded under s. 562 because it had not been disposed of upon a preliminary point so as to exclude evidence of fact, and the Court should therefore proceed to dispose of it upon the evidence on the record, if any; and that an issue should be remitted to the lower Court under s. 566.

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This was an appeal under s. 10 of the Letters Patent from a judgment of Brodhurst, J., dated the 22nd March, 1886, dissenting from the judgment of Petheram, C. J, and affirming the decision of the Subordinate Judge of Meerut, who had dismissed the suit. The facts of the case are stated in the report of the case before the Division Bench (1) and in the judgment of Straight, J., now reported. For the purpose of making the arguments of counsel intelligible the following summary will be sufficient:—The parties were Sunni Muhammadans. The suit was brought by Muhammad Allahdad Khan and Musammat Hakimun-nissa (to whom Muhammad Allahdad Khan had sold his rights and interests in a portion of the property in dispute) against Muhammad Ismail Khan and his three sisters, and three other persons, for a declaration of right to and possession of two shares in certain villages left by Ghulam Ghaus Khan, father of the first four defendants, upon the ground that the first-mentioned plaintiff was the eldest son of Ghulam Ghaus Khan and brother of the defendants, and was therefore entitled to the shares, under the Muhammadan law, by right of succession. The defence of the first four defendants was to the effect that Allahdad Khan was only the step-son of Ghulam Ghaus Khan, having been born prior to the marriage of his mother, Moti Begam, with Ghulam Ghaus Khan. The case of the plaintiffs was that even if they failed to prove that Allahdad Khan was the son of Ghulam Ghaus Khan, yet Ghulam Ghaus Khan had, on various occasions, acknowledged him to be his son, and therefore, under the Muhammadan law, Allahdad Khan was entitled to inherit as the legitimate son of Ghulam Ghaus Khan. They filed certain letters and other documents in which the deceased expressly referred to Allahdad Khan as his son; and contended that these references amounted to acknowledgments of him as a son by the deceased, which, under the Muhammadan law, gave him the status of a legitimate son.

(1) I. L. R., 8 All. 234.

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The defendants 5, 6, 7 held a lease of parts of the property in suit from the daughters of Ghulam Ghaus Khan. They filed a written statement of defence in the following terms:—

"That defendants have taken the lease of the villages from the actual owners, and they have reason to believe that the plaintiff is not the legitimate son of Ghulam Ghaus Khan. Defendants have, year after year, paid in good faith the lease-money to the daughters of Ghulam Ghaus Khan, the owners of the property, from whom defendants have taken the lease. Defendants have been unnecessarily joined as parties to the suit."

No issue was fixed by the Court of first instance with reference to this written statement. The issues which it framed were:—"1. Whether Allahdad Khan, plaintiff, is a son of Ghulam Ghaus Khan? 2. Whether this suit is vitiated by the defect of champerty and ought for that reason to fail? 3. What amount of stamp duty ought, according to law, to have been paid on the deed to Hakim-un-nissa, and is it receivable in evidence in this suit? 4. Had Allahdad Khan, plaintiff, knowledge of the proceedings in the former suits while they were pending, and is his not being a party to them a bar to this suit? 5. What amount of debts, if any, due by Ghulam Ghaus Khan has been paid by Ismail Khan? 6. What sort of decree, if any, is the plaintiff entitled to?"

The Court decided the first four of these issues only. After dealing at length with the first issue and deciding it against the plaintiffs, the Subordinate Judge observed that, in his view of the case, it was not necessary to determine the other issues.

The conclusions of the learned Judges of the Division Bench hearing the appeal are thus summarised in the head-note of the report at I. L. R. 8 All. 235:—"*Held* by Petheram, C.J., that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the status of a legitimate son capable of inheriting the deceased's estate, although the evidence showed that the deceased never treated him as a legitimate son or intended to give him the status of legitimacy. *Held* by Brodhurst, J., that the documents above referred to did not show more than that the deceased regarded the plaintiff as his stepson; that the plaintiff was never called his son except by courtesy, and in the

sense in which a European would ordinarily describe his stepson as his son: and that there was no sufficient evidence of acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognise the plaintiff and give him the status of a son capable of inheriting."

The grounds on which the plaintiffs appealed from the judgment of Brodhurst, J., were as follows:—

1. "Because the appellant is proved to be a legitimate son of Ghulam Ghaus Khan.
2. "Because, under the Muhammadan law, the acknowledgments of Ghulam Ghaus Khan are sufficient to establish that the appellant is his legitimate son.
3. "Because the onus of proof was on the respondent, and he has failed to discharge that onus."

Mr. *G. E. A. Ross* and the Hon. Pandit *Ajudhia Nath*, for the appellants.

Mr. *G. T. Spankie*, the Hon. *T. Conlan*, and Babu *Jogindro Nath Chaudhri*, for the respondents.

The Hon. Pandit *Ajudhia Nath*, for the appellants, referred to a passage in Syed Amir Ali's "Personal Law of the Muhammadans" (at pp. 166, 167), to the effect that the Muhammadan law does not recognise adoption in the sense of the Roman and Hindu legal systems or "any mode of *filiation* where the parentage of the person adopted is *known* to belong to a person other than the adopting father;" but only the form of filiation created by *ikrar* or "acknowledgment," which can be established by the father alone. The essential condition of this mode of filiation is that the person to be filiated must not be known to be the son of a person other than the acknowledger. The author goes on to say that such acknowledgment may be either express or implied, and may be inferred from treatment of the child. See also Elberling's Treatise on Inheritance, &c., pp. 43, 44. The rules of the Muhammadan law as to acknowledgment are not mere rules of evidence. If a Muhammadan acknowledges another to be his brother, that, according to the Muhammadan law, does not prove the relationship asserted, but makes the acknowledged the heir of the acknow-

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ledger in the absence of other heirs. On the other hand, an acknowledgment of another as son is deemed to constitute the consanguinity. He also referred to Baillie's Digest of the Muhammadan Law, pp. 404, 405.

[EDGE, C. J.—The passage at p. 105 seems to show that the circumstances must amount to a reasonable presumption of actual paternity.]

My contention is that it is not a question of presumptive or other evidence: the acknowledgment has the force of an affiliation.

[STRAIGHT, J., referred to *Najmooddeen Ahmed* v. *Bebee Zuhoorun* (1), in which Macpherson, J., cited the passage from Baillie, pp. 404, 405 as establishing the proposition that the acknowledgment of the father renders the son a legitimate son and heir, whether the mother was or was not lawfully married to the father.]

The acknowledgment is binding not only on the acknowledger but on all the world. The acknowledged person succeeds his brothers as their heir. This suggests that the acknowledgment does not merely operate by way of estoppel or conclusive proof. It cannot be contradicted either by the acknowledger or by any of the other members of his family. If ever brought into question, the inquiry must be limited to ascertaining whether, in fact, words or conduct amounting to an acknowledgment were ever uttered or took place. If this is proved, the affiliation follows as a necessary legal consequence and cannot be questioned.

[MAHMOOD, J.—Syed Amir Ali at p. 188 of his book points out that the adoption practised by the pre-Islamic Arabs was abolished by reason of the teaching of the Prophet; and in the Koran there is a verse which says that no one can be the son of a man from whose loins he has not sprung. It appears to me that, under the Muhammadan law, affiliation independent of blood relationship does not exist.]

The passage referred to merely condemns the kind of adoption formerly practised: it does not prohibit affiliation by acknowledgment. See also Grady's edition of the *Hedaya* (Hamilton's translation), 2nd ed., p. 439 ("acknowledgments of parentage with

(1) 10 W. R. 45.

respect to infants"). This shows that once an acknowledgment has been proved, nothing further is required to constitute parentage.

[STRAIGHT, J. referred to *Muhammad Azmat Ali Khan* v. *Musammat Lalli Begam* (1).]

In Macnaghten's Principles of Muhammadan Law (chapter IV, on Parentage) it is laid down that "if a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established."

[EDGE, C. J.—Does not that mean that, under the circumstances stated, the actual parentage is to be deemed proved?]

No; the actual parentage is, *ex hypothesi*, unknown, and the acknowledgment operates as an affiliation. It resembles in some respects the Kritrima form of adoption in the Hindu law.

In the Sirajiyyah (Sir William Jones' translation, edited by Rumsey, p. 3), in enumerating the different classes of heirs, reference is made "to him who was acknowledged as a kinsman through another, so as not to prove his consanguinity." This explains the passage already quoted from Elberling (p. 44); and the distinction which it implies is that an acknowledgment of collateral relationship does not establish consanguinity, but that an acknowledgment of paternity does so. See also Grady's edition of the *Hedaya*, p. 438 ("but it is annulled by a subsequent acknowledgment of the stranger being his son," &c.) The *Hedaya* draws no distinction between rules of substantive law and rules of evidence or procedure. It discusses in the same place acknowledgment or *ikrar* in all its aspects and in connection with all matters in which it may come in question. [He also referred to the *Durrul Mukhtar*.]

[MAHMOOD, J.—If it is not a question of evidence, but acknowledgment operates as a sort of adoption or affiliation, why should it be essential to the validity of an acknowledgment that the acknowledged person should not be known to be son of any one other than the acknowledger?]

That condition was imposed in order to prevent adoptions of the kind practised by the pre-Islamic Arabs (Sale's translation of the

(1) L. R. 9 I. A. 8; I. L. R. 8 Calc. 423.

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Koran, chapter XXXIII). The judgment of the Privy Council in *Muhammad Azmat Ali Khan* v. *Musammat Lalli Begam* (1) is strongly in my favour. See in particular pp. 17, 18, and 19 of the report. The decision is an authority for the principle that an acknowledgment by a Muhammadan is not merely evidence. It is a question of fact in each case whether there has or has not been an acknowledgment. If this is proved, the legitimacy is established. The passages at pp. 18, 19 clearly show where the question of evidence ends and the question of substantive law begins. What can the following sentence mean, if not the proposition for which I contend?—"An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged he acquires the status of legitimacy" (p. 18).

[EDGE, C. J.—Suppose a case in which a woman is known to be married, but her husband has been absent from her for more than a year. Could her child be affiliated by any one other than her husband? Or suppose that the husband, though absent, has had an opportunity of access to the wife.]

In the former case there could be such an affiliation, but s. 112 of the Evidence Act would prevent it in the latter.

[MAHMOOD, J.—Do you contend that the offspring of admitted or proved adultery could be legitimated by acknowledgment?]

Yes. The question is treated as an open one in *Sadakat Hosseiu* v. *Mahomed Yusuf* (2). In that case it was held by the Privy Council that the marriage of the acknowledger with the mother of the acknowledged was not proved; and nevertheless the acknowledgment was held to confer the status of legitimacy. Even if the question is regarded as one of evidence, the principles of the Muhammadan law on the subject should be applied: *Khajah Hidayat Oolah* v. *Rai Jan Khanum* (3), *Ranee Khujoor-oon-nissa* v. *Musammat Roushun Jehan* (4).

[MAHMOOD, J.—The case reported in Moore was decided long before the Evidence Act came into force.

(1) I. L. R. 9 I. A. 8; I. L. R. 8 Calc. 422.
(2) L. R. 11 I. A. 31; I. L. R. 10 Calc. 663.
(3) 3 Moo. I. A. 295.
(4) L. R. 3 I. A. 291.

STRAIGHT, J.—It appears to me to lay down only what is practically the rule of English law, that marriage may be inferred from prolonged cohabitation.]

Oomda Beebee v. *Syud Shah Jonab Ali* (1) and *in the matter of the petition of Musammat Bibi Najib-un-nissa* (2) are strong authorities in my favour.

[MAHMOOD, J.—The judgments in those cases were based on Baillie's Digest and Macnaghten's Principles, and the learned Judges evidently had no opportunity of consulting the original texts.

STRAIGHT, J., referred to *Mahomed Bauker Hossein Khan* v. *Shurf-oon-nissa Begam* (3) and *Muhammad Ismail Khan* v. *Fidayat-un-nissa* (4).

EDGE, C. J.—Can we as a matter of law determine whether Ghulam Ghaus Khan intended what is alleged to be an acknowledgment to have the effect of an affiliation ?]

I contend that if, upon the face of it, it is an acknowledgment, the question of intention cannot be gone into.

[EDGE, C. J.—Then you say that if one man says to another "You are my son," the words, *primâ facie*, work an affiliation ?]

Yes, assuming that the person acknowledged admits the affiliation and the three conditions stated at pp. 167, 168 of Mr. Amir Ali's "Personal Law of the Muhammadans" are fulfilled. I contend, moreover, that in this case there is practically unrebutted evidence which, together with the presumptions of marriage from continued cohabitation and of legitimacy, establish that the appellant is the legitimate son of Ghulam Ghaus Khan.

Mr. *G. T. Spankie*, for the respondents.—Assuming the question to be one of substantive law, and not merely of evidence, still the "acknowledgment" of the Muhammadan law means an acknowledgment not merely of sonship, but of legitimate sonship. This is the real meaning of the judgments of the Privy Council which have been cited. As pointed out by Mr. Amir

(1) 5 W. R., 182.
(2) 4 B. L. R. (A.C) 55.
(3) 8 Moo. I. A. at p. 159.
(4) I. L. R. 3 All. 723, affirmed on appeal by the Privy Council, I. L. R. 8 All. 516.

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Ali, an acknowledgment may be either express or implied. An implied acknowledgment is a continuous and consistent course of treatment of another as a legitimate son. An express acknowledgment must have the same meaning, the only difference being that it consists of words instead of acts. Otherwise the words "This boy is my son" would give the status of legitimacy in the face of a twenty years' treatment as an illegitimate son, both before and after the words were uttered. Where there is an express acknowledgment, its meaning in the particular case must always be considered. The words "This is my son" either may or may not have the effect of a legitimation, according to circumstances. See *Ashruf-ood-Dowlah* v. *Hyder Hossein Khan* (1) at p.p. 103, 104, and 106 of the report. The case is no authority for the proposition that a mere acknowledgment of sonship amounts to an affiliation. In *Muhammad Azmat Ali Khan* v. *Musammat Lalli Begam* (2) the Privy Council did not content themselves with saying that the acknowledgment was proved, but they considered that there was strong evidence as to treatment.

[STRAIGHT, J.—The facts here are that, forty-five years ago, Moti Begam, the appellant's mother, was admittedly the wife of Ghulam Ghaus Khan, though the time of marriage is not shown. The appellant was brought up in the same house; he is written to and described by members of Ghulam Ghaus Khan's family as if he were Ghulam Ghaus Khan's legitimate son. Other children of Ghulam Ghaus Khan and Moti Begam are admittedly legitimate. Under these circumstances, why should we not presume that the appellant also is a legitimate son of the same father?

EDGE, C. J.—You will have to deal with the question whether, in presuming legitimacy from cohabitation, it is or is not essential to show that the period of cohabitation covered a time when the person to whom the dispute relates could have been conceived.]

In *Muhammad Azmat Ali Khan* v. *Musammat Lali Begam* (2) the decision really turned on the evidence of legitimacy, and it was nowhere suggested, from the Court of first instance to the Privy Council, that a bare acknowledgment of sonship would be sufficient.

(1) 11 Moo. I. A. 94.
(2) L. R. 9 I. A. 8; I. L. R. 8 Calc. 422.]

Upon the hypothesis put forward on the other side, one letter containing a clear statement as to sonship would have been unanswerable; but the evidence of treatment was fully gone into. In the case reported in 11 Moore, at p. 104, acknowledgment in the sense of the Muhammadan law is described as "acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition not simply of sonship, but of legitimacy as a son." Again in *Sadakat Hossein* v. *Mahomed Yusuf* (1) their Lordships of the Privy Council accept the conclusion of the Courts below "that there was sufficient evidence of the acknowledgment by Amir Hossein of Selim as his son, from which an inference is fairly to be deduced that the father intended to recognise him and give him the status of a son capable of inheriting." Surely this implies that it is a question of evidence. All the authorities on the Muhammadan law treat it as such a question. The passage which has been cited from p. 439 of Grady's *Hedaya* must be read with the definition of *ikrar* at p. 427 as "the notification or avowal of the right of another upon oneself." Whether such an avowal is intended by a particular statement is a matter of evidence; and nothing short of such an avowal constitutes an "acknowledgment" as understood in the Muhammadan law.

Taking the legitimacy of the defendant Muhammad Ismail Khan and the marriage of his parents ten months prior to his birth as proved, nothing can be inferred as to cohabitation before that time. The facts do not warrant any presumption as to the cohabitation of Ghulam Ghaus Khan with Moti Begam three years or so previously, or as to the date of their marriage or as to the appellant's legitimacy. If it were permissible to infer from the fact of Muhammad Ismail Khan's legitimacy that his parents were married three years prior to his birth, it would be equally permissible if the interval were twenty years or more; and this shows how unsafe such an inference would be.

[EDGE, C. J., referred to the *Berkeley Peerage case* (2).]

A passage in Grady's *Hedaya*, at p. 439, showing that an acknowledgment made by a woman may be contradicted, confirms

(1) L. R. 11 I. A. at p. 36. (2) 4 Camp. at p. 416, and 6 Ves. Jun. 251.

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the view that the question is always one of evidence. See also 9 I. A., p. 14, where an acknowledgment in a formal report to Government, which speaks of the acknowledged as the acknowledger's son, is described as "almost conclusive;" and there occurs this sentence:—"He not only calls him his son, but treats him as he treated Azmat, his undoubted legitimate son." If the acknowledgment had been considered as *ipso facto* establishing the legitimacy, it would have been inconsistent to proceed to examine the evidence on the point of legitimacy. The word *ikrar* means "admission," and admissions form a distinct part of the law of evidence. The Muhammadan law of evidence is excluded by s. 24 of the Bengal Civil Courts Act (VI of 1871). By s. 2 of the Evidence Act, all rules of evidence other than those contained in that Act or some other part of the statute law are expressly repealed. It is true that the case is one of succession, in which the Muhammadan law is saved by s. 24 of the Bengal Civil Courts Act; but it does not follow that the particular question under consideration should be treated as relating to succession: *Mashar Ali* v. *Budh Singh* (1). All the old authorities as to acknowledgment imply the acknowledger's belief that the acknowledged is in fact his son; and affiliation is unknown in cases where the former has had no intercourse with the mother of the latter. This is implied by the three conditions which all writers on the Muhammadan law lay down as essential to the validity of acknowledgments. The use of acknowledgments is always to legitimatise children whose legitimacy is doubtful. The system originated in the practice of cohabitation with slave-girls, who had opportunities of promiscuous intercourse, and whose children, brought up in the master's house, were often of uncertain parentage.

The Hon. Pandit *Ajudhia Nath*, for the appellants, in reply.

STRAIGHT, J.—This is an appeal, under s. 10 of the Letters Patent, from a judgment of my brother Brodhurst, dated the 22nd March, 1886, affirming, in difference with the opinion of Petheram, C.J., a decree of the Subordinate Judge of Meerut of the 3rd of March, 1885. The suit to which the appeal relates was instituted by the plaintiff-appellant before us on the 13th of May,

(1) I. L. R. 7 All. 297.

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1884, in the Court of the Subordinate Judge of Meerut, for a declaration of his right to and possession of his share of the property left by his deceased father, Ghulam Ghaus Khan, who died on the 6th of November, 1879. The defendants cited by him were Muhammad Ismail Khan, son, and Musammats Fidayat-un-nissa, Karamat-un-nissa, and Barkat-un-nissa, daughters, of the said Ghulam Ghaus Khan, and four other persons, lessees or mortgagees in possession of portions of the property leased or mortgaged to them by the other defendants. The real contesting defendant was Muhammad Ismail Khan, and the single and substantial position taken up by him with which we are concerned is that the plaintiff was not a son of Ghulam Ghaus Khan, but that he was born of the body of one Musammat Moti Begam before her marriage with Ghulam Ghaus Khan. The Subordinate Judge found that "the weight of evidence on the record then proves that Allahdad is not really a son of Ghulam Ghaus Khan, and that he never really acknowledged him as such," and he accordingly dismissed the suit. The plaintiff then appealed to this Court, and the case came before a Division Bench consisting of Petheram, C. J., and Brodhurst, J. The former was of opinion that the evidence established that "Allahdad Khan was the illegitimate son of Ghulam Ghaus Khan; that he was born before the marriage of Ghulam Ghaus Khan and Moti Begam; that it is proved by evidence, the truth of which is beyond doubt, that upon several occasions in 1861 and 1862 Ghulam Ghaus Khan did at that time acknowledge the plaintiff, Allahdad Khan, to be his son in fact, and that the case resolves itself into a pure question of law, namely, what, according to the Muhammadan law, is the effect of an acknowledgment by a Muhammadan that a particular person born of the acknowledger's wife before marriage is his son? How does such an acknowledgment affect the status of the person in reference to whom it is made?" Petheram, C. J., then proceeded to discuss three rulings of their Lordships of the Privy Council reported in 11 Moore's Indian Appeals, p. 74, L. R. 9 I. A., p. 8, and L. R. 11 I. A., page 31, which in the result he took to be authorities for the proposition that "an acknowledgment of children by a Muhammadan *as his sons* gives them the status of legitimacy." Upon this view of the matter he would have reversed the decision of the Subordinate Judge and decreed

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the plaintiff's claim. Brodhurst, J., found—"From the evidence and the whole circumstances of the case it is, I think, palpable that Allahdad was not the son of Ghulam Ghaus Khan; that he was not legitimated by Ghulam Ghaus, and that he well knew that he was at the highest nothing more than Ghulam Ghaus Khan's stepson, had never been called his son except by courtesy, and had no right to any share in his (Ghulam Ghaus's) property." He also referred to the case in L. R. 11 I. A., p. 31, and observed: "I see nothing to lead me to believe that Ghulam Ghaus ever regarded Allahdad in any other light than that of a stepson: and applying the principle contained in the above remarks of their Lordships of the Privy Council to the present case, I find that there is no sufficient evidence of the acknowledgment by Ghulam Ghaus Khan of Allahdad Khan as his son from which an inference is fairly to be deduced that Ghulam Ghaus ever intended to recognise him and give him the status of a son capable of inheriting, and I would therefore dismiss the appeal with costs." It is from this judgment of Brodhurst, J, that the appeal now before us has been preferred. The case was very ably argued at the hearing on both sides, and the delay in pronouncing judgment has occurred owing to the necessity that arose for consulting the original texts of the Muhammadan law and considering them in conjunction with the several rulings of their Lordships of the Privy Council to which Petheram, C. J., referred. The contentions for the appellant were—1st, that the evidence established Allahdad Khan, the plaintiff, to be the legitimate son of Ghulam Ghaus Khan; 2nd, that the acknowledgments proved to have been made by Ghulam Ghaus Khan of Allahdad Khan as his son were sufficient to confer on Allahdad Khan the status of a legitimate son. Upon the first of these two matters it is to be observed that while Petheram, C. J., on the one hand, was of opinion that the facts showed the plaintiff to be the illegitimate son of Ghulam Ghaus Khan, Brodhurst, J., on the other, considered that all they proved was that he was "the son of Moti Begam by an unknown father." To clear the way to a consideration of the second ground put forward for the plaintiff, which, in my judgment, raises the real and only question to be determined, I may at once conveniently state that, in my opinion, the finding of Petheram, C. J., that the plaintiff has

proved himself to be the illegitimate son of Ghulam Ghaus Khan, cannot be sustained. For the purposes of this judgment it seems enough to say that the evidence does not establish to my satisfaction that he was born of the loins of Ghulam Ghaus Khan; that the facts go to show that Moti Begam was his mother, but that they do not suggest or prove any particular person to be his father. What the date of Moti Begam's admitted marriage with Ghulam Ghaus Khan is, it seems to me, unproved. The depositions of Muhammad Baz Khan and Sipahdar Khan, witnesses for the plaintiff, the former of whom is his connection by marriage, are, to my mind, of such a character as to make it unsafe to rely upon them, while the same remark applies to the statements of Faizullah Khan, Ilahi Bakhsh Khan, and Sirdar Khan called for the defendant, about whom the Subordinate Judge remarks: "Their demeanour produced in my mind the impression that they were strong partisans who were prepared to swear anything and everything that they found would be favourable to the case for the defence." The fact remains, and an important central fact it is, that at some time or another before the birth of the defendant Ismail Khan, Ghulam Ghaus Khan and Moti Begam had become man and wife; and this is common ground between the parties. Whether their marriage took place before or after the plaintiff's birth is, in my opinion, not established. The first contention for the plaintiff, therefore, must be decided adversely to him. Then arises the crucial and difficult point raised in the second contention on his behalf, namely, that the acknowledgments proved to have been made by Ghulam Ghaus Khan of the plaintiff as his son are sufficient to confer on him the status of a legitimate son, with the legal consequence of a right to inherit. This point involves two questions—1st, what, in fact, were the acknowledgments? 2nd, what is the legal effect, under the Muhammadan law, of such acknowledgments?

With regard to the first of these two matters, it is satisfactory to feel that the materials for determining it are mainly to be found in the shape of documents which, if their authenticity be established, speak for themselves without fear of falsehood. I have said nothing as yet and shall have little to say about the evidence of the plaintiff and the defendant Ismail Khan, because it is obvious to my mind that both of them have made many statements that are

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untrue—notably in the case of the plaintiff as to his ignorance of the litigation between Ismail Khan and his sisters and Musammat Nanhi and her children, upon which point the answers to interrogatories of Sheikh Wahid-ud-din, which I believe, contradict him, and in the case of the defendant as to his denials of the several letters, undoubtedly written by him to the plaintiff, in which he addressed him as "brother" and spoke of Ghulam Ghaus Khan as "the father." Without particularising further, it does not seem to me that any useful purpose would be served by my travelling in detail through the evidence of either of these persons, each of whom called the other as his witness. They are obviously bitterly hostile to one another, and it is clear that neither was over-scrupulous in what he swore to. So far as their testimony is concerned, I think that the one may be fairly set off against the other, as neither can be safely trusted. Before concluding my judgment, I shall later on have something to say with regard to the conduct of the plaintiff, upon which so much stress is laid by my brother Brodhurst and the Subordinate Judge, the materiality of which I need not discuss now.

I turn, then, to the documentary evidence for the plaintiff directly showing statements made by Ghulam Ghaus Khan that the plaintiff was his son and indicating treatment of him as such, which is as follows:—[His Lordship proceeded to discuss the evidence in detail, and continued:]

To sum up the matter briefly, therefore, the case for the plaintiff consists of the direct acknowledgments and treatment of him as a son by Ghulam Ghaus Khan, as shown by the documents Nos. 35A, 36, 37, 38, 39, and 40; his reputation and recognition as a son of Ghulam Ghaus Khan, as disclosed by the documents Nos. 43, 44, 45, and 46 and the various letters written by the defendant to him upon which I have already commented. It seems to me, therefore, that the matter stands thus:—The plaintiff is admittedly the son of Moti Begam, whose marriage to, or carnal intercourse with, any other man than Ghulam Ghaus Khan, is not attempted to be proved and who, at the time of her death in 1859, was admittedly the wife of Ghulam Ghaus Khan. How her connection with him originated, or what the date of her marriage to

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him was, there is no satisfactory evidence to show, but that she lived in his house for a long period of time, cohabiting with him and bearing him several children whose legitimacy is not disputed, is beyond question. The defendant in effect asks us to draw a sharp dividing line between the date of the birth of the plaintiff and of his own, and to find as a fact that no marriage was subsisting when the plaintiff was born, but that it had taken place when he was born. My answer to this proposition must be and is, that there is no evidence upon which I can safely rely to justify me in coming to any such finding, and if the defendant had to maintain the converse position to that now asserted by him, he would be in similar straits as the plaintiff to prove a marriage between Ghulam Ghaus Khan and his mother. That there was no legal obstacle to a marriage must be conceded, and though its date remains unestablished, I need for the purposes of my judgment say no more than this, that it may as well have taken place before as after the birth of the plaintiff.

Such being the material facts as to acknowledgment and treatment of the plaintiff by Ghulam Ghaus Khan, the next point to be determined is, what is the legal effect of such acknowledgments and treatment according to the Muhammadan law? If the rules of that law deal with such matters as questions of evidence, *i.e.*, as mere adjective law, and simply lay down principles for guidance in forming presumptions or drawing inferences, then they would not come within the term "Muhammadan law" as used in s. 24 of the Bengal Civil Courts Act, *i.e.*, the substantive Muhammadan law regarding succession, inheritance, &c., and I should have to deal with the case according to the rules of evidence contained in the Evidence Act. Petheram, C. J., in his judgment has treated the decisions of their Lordships of the Privy Council to which he refers as enunciating rules of substantive law "as laid down in the books," but he adds, "the law so laid down is not, in my opinion, in accordance with the custom of the people of this country." With the most profound respect for so eminent an authority, I think this remark is somewhat misleading and calculated to create doubts and impressions that a close scrutiny of the matter does not warrant. There are many apparent anomalies

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in both the Hindu and Muhammadan law that strike the mind of an English lawyer with astonishment, if not dismay, as irreconcilable with the principles of the English statute and common law that he has been taught; and in India it is natural enough that among our High Court advocates and pleaders, who represent the progress of English thought and influence upon the more or less undigested mass of doctrines and principles to be found in the Mitakshara or the various sources whence the Muhammadan law is drawn, the discussion of questions such as we have here should be maintained on modern lines and according to what may fairly be called popular views. But so long as the rules of the Hindu and Muhammadan law stand with such expositions and rulings as have been made in regard to them by their Lordships of the Privy Council, so long are we, sitting as Judges in this country, constrained by statute to find out what those rules are, and when we have ascertained them with precision to give effect to them. I have done my best to ascertain whether the rulings of their Lordships are in any way at variance with the practices recognised by the Muhammadan community, and I cannot discover that any custom has grown up or exists which overrides or alters those principles of Muhammadan substantive law which I shall presently state in detail. Let us, however, first look to what their Lordships of the Privy Council have said in *Lalli Begam's* case (1) to which Petheram, C. J., among others refers: "Their Lordships, however, are relieved from a discussion of those authorities, inasmuch as the rule of the Muhammadan law has not been disputed at the Bar, *viz.*, that the acknowledgment and recognition of children by a Muhammadan as his sons gives them the *status* of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case. That rule of the Muhammadan law has not been questioned at the Bar." The original case from which the appeal was preferred is to be found reported in the *Panjab Record* for 1875, at page 21 of the Civil Rulings, and from this it appears that Mr. Boulnois, a Judge of the Chief Court, held in effect that "the acknowledgment of a son renders that person the legitimate son of the acknowledger under Muhammadan law, although the person acknowledged was born out of wedlock." This view may

(1) L. R. 9 I. A. 8; I. L. R. 8 Calc. 422.

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possibly seem to be in accordance with the often-quoted passage to be found in their Lordships' judgment in the case of *Ashruf-ood-Dowlah Ahmad Hossein Khan* v. *Hyder Hossein Khan* (1) commencing—"But the presumption of legitimacy from marriage follows the bed, &c." Nevertheless, with the greatest deference, it seems to me that Mr. Boulnois' proposition goes too far, and that it is not in harmony with the texts. I see nothing in their Lordships' judgment in *Lalli Begam's* case (2) to lead me to conclude that they accepted the rule of Muhammadan law in the terms stated by Mr. Boulnois; indeed, they themselves formulated it in the manner already recited by me. This case of *Lalli Begam* is instructive not only from what their Lordships said as to this rule of the Muhammadan law, but from its result in that while the question as to whether Lalli Begam was married to the Nawáb before the birth of the plaintiffs was left undetermined, it was nevertheless held that they had by acknowledgment and recognition by him as his sons acquired the *status* of sons and a title to inherit. Their Lordships remark: "However, there is really no dispute about the law, and their Lordships in this case have not to lay down any new principles of law, but only to apply a well-established principle to the facts." That principle was embodied in the second question stated by them as arising for decision, *viz.*, whether, no marriage between Lalli Begam and the Nawáb being established, there is proof of an acknowledgment and recognition by the Nawáb of the two plaintiffs as his sons which would give them the status of sons and a title to inherit."

Now I do not hesitate to say, having very carefully considered the language of their Lordships' judgment, that they unhesitatingly adopted the view that the rules of Muhammadan law relating to acknowledgment by a Muhammadan of another as his son or daughter, as the case may be, are rules of substantive law, and such an acknowledment, if there is no legal impediment to it, confers a status of legitimacy just as, by the analogy of the Roman law, manumission of a slave conferred on him the status of a free man. Without further preface I proceed to state what the more important authorities are, which, having given them my most careful

(1) 11 Moo. I. A. 94. (2) L. R. 9 I. A. 8; I. L. R. 8 Calc. 422.

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consideration, I take as establishing two propositions: 1st, that proved acknowledgments by a Muhammadan of another person as his son or daughter, if none of the conditions in bar subsist, which will presently appear, confer on such person the status of a legitimate child with its legal consequences; 2nd, that such an acknowledgment once made cannot be recalled either by the acknowledger himself or any one claiming under him. I may remark that the following quotations are, as the names of the authors will show, from the highest sources known to the Muhammadan law:—

BIRJANDI.

"(i) The book on acknowledgment has been placed next to that of evidence, because an acknowledgment is a kind of information and as such like evidence. The reason why these two subjects precede the subjects of claims (دعوى) is that the ascertainment of evidence and acknowledgment occur in most cases before the claim. As a matter of language the word *ikrár* (إقرار) is derived either from *karár* (كرار), which means rest and confirmation, as if the acknowledger establishes by his acknowledgment a right against himself, or the word is derived from *kurrat-ul-ain* (قرةالعين), that is, comfort of the eyes, because the person in whose favour an acknowledgment is made receives thereby comfort to his eyes, and thus the acknowledger comforts the eyes of the person in whose favour the acknowledgment is made (1).

"An acknowledgment is giving information as to the right of a person enforcible against the acknowledger; that is, the person who gives such information. Some difficulty has arisen (in consequence of this definition) in the case of an acknowledgment by an agent appointed to conduct litigation and also in the case of an executor, inasmuch as in these cases the acknowledgment of these persons amounts to giving information as to the right of another

(1) ادردہ مقارنا للشهادة لانه من انواع الاخبار مثلها و تقديمها على الدعوى لما ان تعيين الشاهد والاقرار يكونان قبل الدعوى غالبا و هو في اللغة ماخوذ اما من القرار بمعنى السكون والثبات كانه يثبت بذلك حقا على نفسه او من القرةالعين فان المقرله بذلك يقرعينه فكان المقر اقر عينه *

person against the principal in the one case and the ward in the other (1).

"The requirement of acknowledgment is that it should be indicative of that in respect of which the acknowledgment is made, not a mere allusion thereto. This means that it is indispensable that the acknowledgment should expressly state the subject of the acknowledgment as if it already exists, and that by the acknowledgment the proof thereof is expressed. *It is not an effect of an acknowledgment that anything is for the first time founded or established*, and it is on this account that when the person in whose favour the acknowledgment is made comes to know that the acknowledger was false in his acknowledgment, the subject of the acknowledgment is not lawful to such a person (as a matter between him and his Creator, the Almighty), since he would in such a case be taking the subject of acknowledgment without the real willingness of the acknowledger. But if the acknowledger has delivered the subject of acknowledgment willingly, then it is lawful and becomes like an investiture of ownership by the acknowledger, and as such on the footing of a gift. This is so because ownership is established in favour of him for whom the acknowledgment is made, and this without any verification or acceptance on his part; but such ownership is nullified by his rejecting it, so that if he first verifies it and then rejects it, such rejection is not valid. So in the *Kafi* (2).

"(ii) If a person acknowledges the sonship of a boy whose descent is unknown, and he is such that one like him can be born of one

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(1) هو اخبار الحق لآخر عليه اى على المخبر و هذا يشكل باقرار الوكيل بالخصومة و الوصي فان اقرارها اخبار الحق لآخر على الموكل او اليتيم *

(2) و حكمه ظهور المقربه لا انشاء اى حكم الاقرار ان يظهر بالمقربه كانه ثابتا و بالاقرار يظهر ثبوته و ليس حكمه ثبوته ابتداء و لهذا اذا علم المقربه ان المقر كاذب فى اقراره لا يحل المقربه في ما بينه و بين ربه تعالى اذا اخذه عن كره منه فان سلمه بطوب نفسه يحل و يكون تمليكا مبتداء منه بمنزلة الهبة و الملك يثبت للمقربه بلا تصديق و قبول و لكن يبطل برده فلو صدقه ثم رده لا يصح رده كذا في الكافي *

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like the acknowledger, and the boy verifies the acknowledgment, his descent is established. This has accidentally been mentioned with reference to the sonship of a boy, because, even if the acknowledgment of a daughterhood is made in respect of a woman, the same rule applies. But it is essential that such sonship (or daughterhood) should be without an intermediary link: so much so that if an acknowledgment is made that the boy is the son's son of the acknowledger, the descent is not established, and this result is similar to that of acknowledging another to be a brother (1).

"It is a condition precedent (to the validity of acknowledgment of parentage) that the descent of the acknowledged be unknown, because, if his descent is known, his sonship other than his parent would be impossible. What is meant by a descent not being known is that it should be unknown in the town in which he resides, and this explanation is contained in the *Kifaya* that the trustworthy reference is to the place of birth. It is stated in the *Kenaya* that when a person regarding one whose descent is known says, "This is my son, and when I die all my estate is his," then according to some of the jurists the acknowledged will be entitled to one-third of the estate by way of legacy, whilst according to other jurists he would not be entitled even to one-third: and this last doctrine seems to be most consistent with right principles (2).

"The limitation that the acknowledged might have been born of the acknowledger means that the age of the acknowledger should exceed the age of the acknowledged at least by twelve years, and this because it is the minimum period of puberty for a youth;

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(1) و لو اقر بنبوة غلام جهل نسبه و يولد مثله لمثله و صدقه الغلام يثبت نسبه التقييد بنبوة الغلام إتفاقي إذا و اقر بنبوة المرأة كان الحكم كذلك ايضا ينبغي ان تكون النبوة بلا واسطة حتى لو اقر بغلام انه ابن ابنه لا يثبت النسب و كان حكمه حكم ما إذا أقر باخ *

(2) وقيد بقوله جهل نسبه لانه لو كان معروف النسب امتنع نبوته من غيره والمراد بجهالة النسب جهالة في البلدة التي هو فيها صرح بذلك في القنية و ذكر في الكفاية ان المعتبر مسقط راسه و مولده و في القنية اذا قال لمعروف النسب هذا بني و اذا مت فهو تركتي له فعند بعض المشايخ يستحق الثلث بطريق الوصية و عند بعضهم لا يستحق الثلث و هو اشبه بالصواب *

and this limitation is necessary because if the acknowledger had not attained puberty, the acknowledgment would be falsified obviously. It is also a condition that the acknowledged boy should verify the acknowledgment, because, if he does not verify, an impediment is created and his descent is not established by the mere acknowledgment, but requires proof. This, however, applies only to cases in which the boy acknowledged is capable of expressing himself; when he is too young to express himself, verification by him is not a condition. It is stated in the chapter on the manumission of slaves in the *Fatawa Kázi Khán* that some jurists have held that sonship is not established unless it is verified by the person in whose favour it is made. But the correct doctrine is that such a condition is not essential as above stated, and this is in conformity with the doctrine of the *Hedaya* and many other books (1)."

AINI.

"In the case of a man in sickness acknowledging a youth of unknown parentage it is a condition that such a youth might have been begotten by such an acknowledger, because, if the acknowledged is older in age, the obvious fact falsifies the acknowledgment. Indeed, *Málik* has gone the length of holding that even if notoriety contradicts the acknowledger, such as by indicating that he was an Indian whilst the acknowledged boy was a Persian, the latter's descent is not established. The restriction that the acknowledged youth should verify the acknowledger has been imposed because the rule as to a youth who can express himself is applicable owing

(1) وقيد بقوله يولد مثله لمثله اى يكون سنه ازيد من سن المقرله باثنتى عشرة سنة و هي ادنى مدة يحتلم فيها الغلام و ذلك لانه لو لم يكن كذلك كان مكذبا في الظاهر و شرط تصديق الغلام له اذا لو لم يصدقه الغلام حصل له معارض فلا يثبت النسب بمجرد الاقرار بل لابد من البنية و هذا اذا كان الغلام يعبر عن نفسه اما اذا كان صغير الا يعبر عن نفسه فلا يشترط تصديقه — و في كتاب العتق من فتاوى قاضي خان قال بعض مشايخنا لا يثبت النبوة إلا بتصديق المقرله و ايصحح انه لا يشترط تصديقه و ما ذكرنا اولا هو الموافق لما في الهداية و كثير من الكتب •

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to his being in his own competency, whilst, on the contrary, an infant is in the power of another, and as such descends to the footing of animals, and no importance is attached to his verification. But according to the three Masters (*i.e.*, Imam Abu Hanifa, Imam Muhammad, and Kázi Abu Yusuf) the descent is established without any such verification if the acknowledged be below the age of discretion. The descent is established because it is one of the necessities of nature, and there can be no objection thereto, even though the acknowledger be in sickness at the time of the acknowledgment. The acknowledged youth will participate with the heirs in the inheritance, because such is one of the consequences of the proof of descent. The acknowledgment by such in respect of a child or parents or wife or a manumitted slave will hold good, because, since it does not involve attribution of descent to any one else, the acknowledgment must be accepted (1)."

DURRUL MUKHTAR.

"(i) If a person makes an acknowledgment in favour of a stranger whose parentage is unknown and thereafter acknowledges him to be his son, and the latter verifies it whilst he is one of those who are fit to make such a verification, his descent is established with reference to the time of his being begotten (2).

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(1) و إن اقر رجل بغلام مجهول النسب يولد مثله اى مثل هذا الغلام لمثله اى لمثل هذا المريض قيد به لانه اذا كان اكبر منه سنا كذبه الظاهر حتى عند مالك لو كذبه العرف بان يكون هنديا والغلام فارسيا لايثبت نسبه انه اى ان هذا الغلام ابنه فصدقه اى المقر الغلام قيد به لان المسئلة فى الغلام المعبر عن نفسه لانه حينئذ يكون في يد نفسه بخلاف الصغير لانه في يد غيره فتنزل. منزلة البهيمة فلم يعتبر تصديقه و عندالثمانة يثبت نسبه بلا تصديقه ايضا لو غير مكلف ثبت نسبه لانه من العوائج الاصلية و لاتهمة فيه و لوكان المقر في حال إقراره مريضا و شارك الغلام الورثة فى الميراث لانه من ضروريات ثبوت النسب و صح اقراره اى اقرار الرجل بالولد والوالدين و الزوجة المولى لانه ليس فيه حمل النسب على غير فيقبل *

(عيني شرح كنز جلد ۲ صفحه ۱۹۲)

(2) و إن اقر لاجنبي مجهول نسبه ثم اقر بنبوته و صدقه و هو من اهل التصديق ثبت نسبه مستندالوقت العلوق *

(الدرالمختار باب اقرارالمريض صفحه ۶۰۴-۶۰۳) *

"(ii) If a person makes an acknowledgment in favour of a youth whose parentage is unknown either at his birthplace or in the town where he is, that the latter is his son, and the acknowledger and the acknowledged are such in age that the latter may be born of the former as a son, and the youth verifies it, he being capable of discretion (because otherwise his verification is not necessary as already stated), then his descent is established, though the acknowledger be in sickness: and when the descent is so established, the youth will participate with the other heirs (1)."

ASHBAH.

"When the person in whose favour an acknowledgment is made falsifies the acknowledger, the acknowledgment is nullified, except in the case of acknowledgment as to the freedom of slaves, as to the parentage, and as to the rights arising out of manumission of slaves: so the rule has been laid down in the *Sarah-ul-Majma* on the ground that such acknowledgments are not susceptible of annulment (2)."

ALAMGIRI, VOL. I.

"(i) When a man acknowledges a son expressly or impliedly, the negation thereof will not be valid thereafter, whether such acknowledgment is made at the time of the birth or afterwards. Express acknowledgment is when a man says '*The child is mine*' or says '*This is my child*;' and implied acknowledgment is that the man should remain silent when he is being congratulated upon

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(1) و ان اقر الغلام مجهول النسب في مولده او في بلد هو فيها و هما في السن بحيث يولد مثله لمثله اذه ابنه و صدقه الغلام او صبي او الا لم يحتج لتصديقه كما مر و حينئذ ثبت نسبه و لو المقر مريضا و اذا ثبت شارك الغلام الورثة *

(الدرالمختار صفحه ٦٠٣) *

(2) المقر له إذا كذب المقر بطل إقراره إلا في الاقرار بالحرية والنسب والولاء العتاقة كما في شرح المجمع معللا بانها لاتحتمل النقض *

(اشباه والنظائر كتاب الاقرار صفحه ٣٢٢)

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the birth of the child, in which case he may be required to take an oath. So in the *Ghayat-ul-bayan* (1).

"(ii) If the husband is without penis and she is not aware of his condition and gives birth to a child and he claims him, then the Kázi is to hold his descent to be established; and if she thereafter comes to be aware of his condition and therefore claims separation, she is entitled to do so, because the child necessarily becomes his even without proof of sexual intercourse (2).

Page 27, Bailie, and Note.

"(iii) A man says in favour of a boy 'There is my son' and then he dies; thereafter the mother of the boy, she being a free woman, comes forth and says 'I am the wife of deceased.' Thereby she is the wife of the deceased, and both she and the boy inherit from him (3).

"(iv) If a man has illicit intercourse with a woman, who then becomes pregnant, and afterwards marries her and she then gives birth to a child, if such child is born after expiration of six months or more, his descent is established. But if she gives birth within less than six months his descent is not established, unless he claims him and does *not* say that the child is the result of illicit intercourse. But if he says that the child is born of me by illicit

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(1) إذا اقر بالولد صريحاً او دلالة لايصح النفي بعد ذلك سواء كان بحضورة الولادة او بعدها والصريح ان يقول الولد منى او يقول هذا ولدي والدلالة ان يسكت إذا هنئ لكنه يلاعن كذا في غاية البيان ●

(فتاوي عالمگيري جلد اول كتاب الطلاق باب اللعان صفحه ٧٠٣)

(2) إن كان الزوج مجبوبا ولم تعلم بحاله فجاءت بولد فادعاه و اثبت القاضي نسبه ثم علمت بحاله فطلبت التفرقة لها ذلك لان الولد لزمه بغير جماع ●

(فتاوي عالمگيري جلد اول باب ١٢ بحث المجبوب صفحه ٧١٠)

(3) رجل قال لغلام هذا إبني ثم مات ثم جاءت ام الغلام و هي حرة و قالت إنا امرأته فهي امرأته ويرثانه ●

(فتاوي عالمگيري جلد اول باب ثبوت النسب صفحه ٧٢٦)

intercourse, the descent is not established and he will not inherit from him. So in the *Yanasi* (1)."

FATWA KÁZI KHAN.

"(i) A man has married a woman by a *defective* marriage and thereafter he retires with her, and thereafter she gives birth to a child after expiration of six months; his descent is established from him. There is difference of opinion as to the exact fixation of this time, because the question is whether those six months are to be calculated from the date of the marriage or from the time of retirement. Abu Hanifa and Abu Yusuf (on whom be peace!) regard this from date of the marriage; but Muhammad regards the six months from the time of retirement, and this is the accepted doctrine. In the case of a valid marriage all the three Masters are agreed that the period is to be regarded from the time of the marriage. Some of the jurists have said that in the case of the valid marriage retirement is not a condition precedent, but that there must be a state of things when they might have had intercourse (2).

"A man has had illicit intercourse with a woman and she is impregnated by him, and during her pregnancy he marries her and has not had sexual intercourse with her till she gives birth to a child; then they (i.e., the three) have held that the marriage is valid, if she was not during her *iddat* in consequence of some one else and penitence is necessary for him; and the jurist Abulhai

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(1) و لو زنى بامرأة محصنة ثم تزوجها فولدت إن جاءت به ستة اشهر فصاعد إثبت نسبه و إن جاءت لاقل من ستة اشهر لم يثبت نسبه إلا إن يدعيه و لم يقل إنه من الزنا اما إن قال إنه من الزنا لايثبت نسبه و لا يرث منه كذا في الهنا يه *

(فتاوى عالمكيري جلد اول باب ثبوت النسب صفحه ٧٢٧)

(2) رجل تزوج امرأة نكاحا فاسدا فدخل بها فجاءت بولد ستة اشهر ثبت النسب منه اختلفوا في إعتبار هذا الوقت إنه يعتبر ستة اشهر من وقت النكاح او من وقت الدخول قال ابو حنيفة و ابو يوسف رح يعتبر من وقت النكاح و قال محمد رح يعتبر ستة اشهر من وقت الدخول و عليه الفتوى و في النكاح الصحيح اجمعوا على إنه يعتبر المدة من وقت النكاح و قال بعضهم يشترط الدخول في النكاح الصحيح لكن لابد من خلوة *

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holds that if she gives birth to the child after the expiration of six months or more from the time of the marriage, the marriage is lawful and the descent is established. But if she gives birth to the child in less than six months from the date of the marriage, the marrage is not established and the child will not inherit from him, *unless* the man says 'This is a son from me' and does not say 'This is the offspring of illegitimate intercourse' (1).

"(ii) A man has married a woman and she gives birth to a child in less than six months. Muhammad maintains that the marriage is defective 'according to my views and those of Abu Yusuf' (2).

"A Majbub has married a woman who lived with him for a time and then gave birth to a child. Abu Yusuf in such a case holds that the son is his son and she is lawful to him (3).

"(iii) A man has married a woman and has then divorced her at the time before intercourse, and she gives birth to a child at the end of six months from the time of the marriage. The child is his child, though Zufar holds a contrary view (4)."

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(1) رجل زنى بامرأة فحملت منه فلما استبان حملها تزوجها الزنى ولم يطأها حتى ولدت قال ان لم تكن في عدة الغير جاز النكاح و عليها التوبة و قال الفقيه ابواللهث رح إن جاءت بولد ستة اشهر فصاعدا من وقت النكاح جاز النكاح و يثبت النسب و إن جاءت بولد لاقل من ستة اشهر من وقت النكاح لايثبت النسب و لا يرث منه إلا إن يقول الرجل هذا الولد مني و لا يقول من الزنا •

(فتاوي قاضي خان فصل في مسائل النسب صفحه ٣٢١ - ٣٢٢)

(2) رجل تزوج بامرأة فجاءت لولد تام لاقل من ستة اشهر قال محمد رح النكاح فاسد في قولي و قول ابي يوسف رح •

(3) مجبوب تزوج امرأة فمكثت عنده زمانا ثم جاءت بولد قال ابو يوسف رح الولد ولده و يحللها ذلك لزوج كان قبله طلقها ثلثا •

(فتاوي قاضي خان صفحه ٣٢٣)

(4) رجل تزوج امرأة و طلقها من ساعة قبل الدخول فجاءت بولد على تمام ستة اشهر من وقت النكاح كان الولد ولده خلافا لزفر رح •

(فتاوي قاضي خان صفحه ٣٢٣)

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From these passages it appears to me that the proposition stated by their Lordships of the Privy Council in *Lalli Begam's* case, as not being questioned before them, but which has been questioned before us in this appeal, namely, that the acknowledgment of children by a Muhammadan as his sons gives them the status of sons capable of inheriting as legitimate sons, unless certain conditions exist, is established to be a distinct and specific rule of the substantive Muhammadan law relating to inheritance to which we are bound to give effect. Birth during wedlock, that is to say, legitimate birth, necessarily confers a right to inherit; illegitimate birth, that is, without wedlock subsisting between the father and mother at the date of the child's begetting, confers no such right. But where there is no proof of legitimate birth or illegitimate birth and the paternity of a child is unknown in the sense that no specific person is shown to have been his father, then his acknowledgment by another, who claims him as his son, according to the authorities I have quoted from, affords a conclusive presumption that the child acknowledged is the legitimate child of the acknowledger and places him in that category. In the present case we have the fact that Moti Begam, the undoubted mother of the plaintiff, admittedly at some time or other, when it was we have no reliable proof, became the wife of Ghulam Ghaus Khan, that the plaintiff was acknowledged as a son by Ghulam Ghaus Khan and treated by him as such, and the plaintiff accepted and described himself as holding that position. It seems to me, therefore, that the requirements of the rule of the Muhammadan law have been satisfied, and that the plaintiff has established his acknowledgment and recognition by Ghulam Ghaus Khan as a son which gave him the status of a son and a title to inherit. This being so, it remains to be seen whether such a status once conferred can be destroyed by any subsequent act of the acknowledger or those who claim through him? It is equally clear that it cannot, and in support of this view there are not only the authorities of the Muhammadan law which I have quoted, but a decision of their Lordships of the Privy Council reported in 11 Moore's Indian Appeals, p. 94, in which it was held "that the denial of a son after an established acknowledgment, though supported by a deed of repudiation and disclaimer by the father, is

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untenable." As it seems to us that there were distinct acknowledgments by Ghulam Ghaus Khan of the plaintiff in 1861, it becomes immaterial to consider whether Ghulam Ghaus Khan did or did not personally cause, or bring about, the entry which was made in the *wajib-ul-arz* of September 12th, 1870, upon which so much stress was laid by the learned counsel for the defendant in the course of his argument: though, if it were necessary to do so, I should have said without hesitation that there is no evidence to show that it was the result of any act or declaration of his. From the same point of view it is unnecessary to discuss the conduct of the plaintiff in regard to the suit brought by the defendant in 1880 and his delay in coming into Court with his present claim. None of these matters could alter or destroy his status as a son if once conferred by acknowledgment, and it would serve no useful purpose, and only lead me into greater length in a judgment already sufficiently prolix were I to explain my views in detail with regard to them.

For the reasons I have given I have come to the conclusion that this appeal must be decreed and the status of the appellant as the legitimate son of Ghulam Ghaus Khan, with the consequent right of inheriting a share in the deceased father's estate, be declared.

Then arises the question as to the precise form our order should take, and I much regret that upon this point I am at difference with the learned Chief Justice and my brother Mahmood. I feel sure that I must be wrong in my own view, and I have endeavoured to convince myself that I am, but I am unable to do so.

In determining what our order should be, it is necessary to examine the terms of ss. 562, 563, and 564 of the Civil Procedure Code; for if I understand the matter aright, those sections read together and in contrast to the provisions of ss. 565, 566, distinctly direct a Court of appeal not to remand a case, unless it has been determined and disposed of by the Court of first instance "upon a preliminary point, so as to exclude any evidence of fact which appears to the appellate Court essential for the determination of the rights of the parties, and the decision upon such preliminary point is reversed in appeal."

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The question here, then, is whether the Sub-Judge can be said to have disposed of this suit upon a preliminary point, to the exclusion of evidence of fact. In determining that question it is important to see, apart from the mere question of the status of the plaintiff, which, with the rest of the Court, I am willing to treat as a preliminary point, and which the Sub-Judge has determined, what were the other issues raised? It will not be disputed that the first four issues settled by the Sub-Judge for trial, including that of status, have been disposed of by him. The fifth issue which he settled was this—"What amount of debts, if any, due by Ghulam Ghaus Khan has been paid by Ismail Khan? That issue was fixed in reference to the seventh paragraph of the written statement, in which Ismail Khan vaguely and without any particulars said:—"The plaintiff has in his petition of plaint referred to the balance of the mortgage money due by the ancestor, but he has not mentioned the large debt paid by the defendant: the latter, like the former, is also payable from the property."

Now no one would deny, having regard to the Full Bench ruling of this Court (1), and according to the principles of the Muhammadan law of inheritance, that so far as Ismail Khan was concerned, if he was in possession of the estate of Ghulam Ghaus Khan, and if he had paid the debts of Ghulam Ghaus Khan, he would be entitled to hold on to the possession of Allahdad Khan's share of that estate, so long as, and until, Allahdad Khan paid off his quota of the debts which Ismail Khan had paid: and this is not denied.

But in the plea taken by Ismail Khan which, I have said, is of the vaguest possible kind, no mention is made of any debts that were paid, and, for aught I know to the contrary, no such payments were ever made. An issue having been fixed by the Sub-Judge in reference to that question, there is not a pretence for suggesting, and Mr. *Conlan* frankly admits that upon the face of this record there is not a particle of proof to show, that Ismail Khan ever paid a pice of the debts of the ancestors. Moreover, I have asked in vain to have pointed out to me any trace upon the record to indicate that at any stage of the trial in the first Court,

(1) *Jafri Begam* v. *Amir Muhammad Khan*, I. L. R. 7 All. 822.

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the Subordinate Judge, either by order or expression of opinion, actually excluded or led the defendant Ismail Khan or his pleaders to believe that he would exclude, or that it was unnecessary to produce evidence upon this point.

What, then, are the materials from which I am to infer that the Court below disposed of this case upon a preliminary point, so as to exclude any evidence of fact which was necessary for the determination of the rights of the parties? Neither Mr. *Conlan* nor any other person has satisfied me upon this point, and it appears to me that this being so, I am not justified, in reference to the language of ss. 562, 563, and 564 of the Code, and more especially to the prohibition contained in such last-mentioned section, to make the form of remand proposed by the rest of the Court.

It is clear, and in accordance with many expressions of opinion by their Lordships of the Privy Council, the effect of which is embodied in those sections, that a Court of appeal should not send a case back to a Court of first instance in such a way as to open the door to one or both of the parties making a new case with fresh evidence—a most dangerous thing to do in this country. There is nothing whatever to show in the present instance that Ismail Khan was prevented from producing evidence or led to believe by the Court of first instance that the evidence upon the question of payment of debts was unnecessary because it was going to decide the case upon a preliminary point. I do not think that we are entitled sitting here upon this point, and upon a mere speculation as to the possibility of Ismail Khan having had some claim to an equitable charge in respect of the debts of Ghulam Ghaus, paid by him, to remand the case back to the Court of first instance generally, so as to allow of a third person, who has acquired his interest *pendente lite* and after the appeal was filed here, to open up this part of the defence *de novo* and call witnesses and give other proof which Ismail Khan never attempted to produce.

There was undoubtedly, and the learned Chief Justice has put his finger upon that, a defence set up by the three persons, lessees of the villages from Ismail Khan, against whom the relief sought

is stated in the third paragraph of the plaint. It is true, no doubt, that if those lessees had proved the matter set out in their statement of defence, there might have been, *primâ facie*, a good answer in point of law to the claim of the plaintiff. In respect of these defendants it may be said that no issue was specifically stated by the Sub-Judge in respect of their defence, and their answer to the plaintiff's claim, which would be direct notice to them to give their evidence in regard to it. That being so, I am disposed to assist them to this extent, that, as the Court of first instance failed to frame an issue with regard to these defendants, and as the determination of such an issue appears to me essential for the right decision of the case, I would remit an issue under s. 566 of the Code to the lower appellate Court for determination.

The matter therefore stands thus :—In my opinion, as regards Ismail Khan, we cannot remand the case under s. 562 of the Code, because it has not been disposed of upon a preliminary point so as to exclude evidence of fact, and we should therefore proceed to dispose of it upon the evidence upon the record, if there is any. It is said for the plaintiff, and I see no reason to doubt it, that there is no evidence on the record of the payment of any debt of Ghulam Ghaus Khan by Ismail Khan, and therefore, in regard to that particular matter, we ought, in my opinion, to dispose of it at once, and, there being no evidence, to dispose of it adversely to Ismail Khan.

With regard to the second question, I would remand an issue to try the question as to whether the defendants, lessees, did pay to Ismail Khan the rent of such land under a *bonâ-fide* belief that he was the true proprietor. The question of costs would have to be determined hereafter.

EDGE, C. J.—I have had an opportunity of reading and considering and in fact discussing with my brother Straight and my brother Mahmood my brother Straight's judgment, on the status of the plaintiff Allahdad Khan. With that judgment, so far as it deals with the status and rights of inheritance of Allahdad Khan, I concur for the reasons stated by my brother Straight. But I do not agree with him as to the course we should take under the circumstances.

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First of all we must consider s. 562 of the Civil Procedure Code. It appears to me that s. 562 applies not only to a case in which the Judge of the Court of first instance has expressly excluded evidence, but that also it applies to a case in which the parties may have been or were by the act of the Judge misled as to the issues or the evidence necessary in the case. I think it would apply to a case in which it was apparent that a Judge intended only to consider one issue, such as the status of the plaintiff as an heir as in this case ; or an issue of limitation ; and where the parties owing to the view of the Judge on that point did not tender or bring forward their evidence. It appears to me here in this case that the main contention in the Court below as in fact here in appeal was as to the status of the plaintiff Allahdad Khan. In fact, during the whole of the argument of this case there was no word addressed to us by either other side, so far as I remember, in regard to any of the issues, except as to the legitimacy to be inferred from the acknowledgment of Ghulam Ghaus Khan. I do believe that the probability is that in the Court below the same course was followed, and that the attention of the Judge and the parties was almost exclusively directed to the exceedingly interesting point of law as to the effect of the acknowledgment made by Ghulam Ghaus Khan. It is quite true that we are told that in this case there is nothing on the record to show that any evidence was in fact excluded, not in the broad sense in which I use the word excluded, but in the contracted sense of exclusion by a rule or order of the Judge. That proposition put so broadly, I am bound to say, I do not concur in. Because with regard to the issues raised by the defendents Nos. 5, 6, 7, the so-called lessees, I think it can hardly be said that their evidence was not excluded within any reading of s. 562, because the Judge for some reason omitted to frame any issue on their written statement. In their case they raised certain questions which would have to be tried. I do not express at present any view as to whether, if that written statement were proved, the allegations contained in it would amount to a defence in law, but it was the duty of the Court to inquire whether those allegations were true or not.

It is also true in this case that no affidavit is produced to show that the parties were misled, or that any evidence was excluded by

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the order or direction of the Judge. But we have to remember this, that Ismail Khan, one of the defendants in the suit, was, we are informed, practically a pauper, and these issues, which may not have been tried, may have been very immaterial to him. I think that in this case, if we proceed to finally dispose it on the evidence on the record, it is possible that we may do very material injustice to the parties interested in this litigation. I think, unless we are satisfied that no injustice will be done by proceeding on the evidence on the record as it at present stands, we ought to satisfy our own minds by directing a remand under s 562. The issues, except those numbered 1, 2, 3, and 4, framed by the Judge have admittedly not been tried. There were other issues arising in the case which were not even framed by the Judge; and I do think in a complicated case of this kind it is better that we should extend the operation of s 562 rather than limit the operation of that section. We have remanded cases under s 562 where all the evidence was on the record, but where we came to the conclusion from the nature of the judgment that the Judge had misunderstood the case. If s. 562 be taken in its literal sense, it is obvious to me that it was our duty in these cases to have tried the real issues raised ourselves and not to have remanded them. I have never had any doubt that s. 562 would be applicable to a case in which the Judge has misunderstood the questions raised by the parties and has in consequence mistried the case. Such a trial could not be said to be a trial at all. I quite agree with what has fallen from my brother Straight that, in remanding cases under s. 562, we should take care that the parties should not have the opportunity of starting an absolutely new case; and I do not propose suggesting to the Judge to whom this case will go that he will give the parties an opportunity of starting a new case. The Judge must take the pleadings of the parties and their admissions and frame issues to dispose of all the material questions and proceed to try those issues on the merits.

For the reasons which I have given I am of opinion that this is a case to which s. 562 applies, and that we ought to remand it under that section. I have to make one observation with regard to s. 563. It appears to me to be a section which had been drafted upon an assumption that there was something in the previous section

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to which it would apply and which gave authority to the Court to say what evidence should be taken on the remand under s. 562. We order the Court to try the case on its merits. Concurring with my brother Straight on the finding as to the status of the plaintiff, I am of opinion that this case should be remanded for the disposal of the rest of the issues under s. 562 of the Civil Procedure Code, and that the costs should abide the result.

MAHMOOD, J.—I concur in what has fallen from my brother Straight as to the facts of the case, and also as to the rules of law applicable to those facts. But because, in the course of the elaborate argument which was addressed to us at the Bar, many suggestions were made as to the exact scope of the rule of Muhammadan law relating to the acknowledgment of parentage, and much was argued as to such acknowledgment being a substitute for adoption as recognised in other systems, such as the Roman or the Hindu law, I am anxious to specify my own views.

First, then, as to the facts of the case, for the reasons so exhaustively stated by my brother Straight, I have no doubt that the following conclusions are justified by the evidence:—

(1) That Moti Begam did not stand in any such position of relationship with Ghulam Ghaus as would render her marriage with him unlawful;

(2) that she is not proved to have been ever married to any person other than Ghulam Ghaus;.

(3) that she was married to Ghulam Ghaus;

(4) that the exact date of her marriage with reference to the birth of the plaintiff Allahdad is *unascertainable* for want of trustworthy evidence;

(5) that she cohabited with Ghulam Ghaus for a considerable number of years and was treated by him as his lawful wife;

(6) that the plaintiff Allahdad was acknowledged and treated by Ghulam Ghaus as his son;

(7) that in such acknowledgment or treatment there was no express specification as to whether Allahdad was a step-son, a legitimate son, or an illegitimate son of Ghulam Ghaus;

(8) that similar acknowledgment or treatment was accorded to him by the defendant Ismail and the other children of Ghulam Ghaus by Moti Begam, and indeed by the rest of the family.

Such being the main conclusions as to the facts of the case, I am desirous of stating the propositions of the Muhammadan law applicable to these facts. My brother has so fully quoted the authorities of the Muhammadan law that I am relieved of the necessity of repeating them, and need only refer to them for formulating my propositions.

The first and perhaps the most important question in the case is whether the rule as to the acknowledgment of parentage is a rule of the Muhammadan substantive law of inheritance or merely a rule of evidence. The question is important, because unless it is a "question regarding succession, inheritance, marriage or caste, or any religious usage or institution," within the meaning of s. 24 of the Bengal Civil Courts Act (VI of 1871) which governs this case, we are scarcely at liberty to apply the Muhammadan law in its integrity to this case, and the alternative would be almost unavoidable to apply to the question the rules of evidence, as to the admissions and presumption of legitimacy, contained in the Indian Evidence Act (I of 1872), by s. 2 of which enactment all other rules of evidence have been abolished.

Now, it cannot be denied that in all mediæval systems of jurisprudence much confusion exists between rules of substantive law and rules of adjective law, that is, between rules which affect the merits and go *ad litis decisionem* and rules which regulate the remedy and, as rules of procedure, only go *ad litis ordinationem*. The Muhammadan system of jurisprudence is no exception to the general rule, and I have before now felt considerable difficulty in distinguishing the rules of the substantive law of Muhammadan inheritance from the rules of evidence. I allude in particular to the case of *Mazhar Ali* v. *Budh Singh* (1), which related to the inheritance of a missing person, and in which, after much consideration, a Full Bench of this Court agreed in holding that the question there raised was a question of evidence and as such governed by ss. 107 and 106 of the Evidence Act.

(1) I. L. R., 7 All. 297.

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Is the question now before us one of a similar character? In order to decide this question I have been at some pains to consult the original authorities of the Muhammadan law which my brother has already quoted, and I am responsible for the English translation of the original Arabic of those texts. The first of them is a passage from *Birjandi* which describes the exact place which *ikrár* or acknowledgment in general occupies in Muhammadan jurisprudence, and the passage leaves no doubt that the Muhammadan jurisconsults themselves do not treat the subject of acknowledgments as forming part of the rules of evidence, though they recognise the fact that acknowledgments resemble admissions. To use the language of *Birjandi*, "an acknowledgment is giving information as to the right of a person enforcible against the acknowledger, that is, the person who gives such information," and "it is indispensable that the acknowledgment should expressly state the subject of the acknowledgment *as if it already exists*, and that by the acknowledgment the proof thereof is expressed." The author then goes on to explain that "it is not an effect of an acknowledgment that anything is for the first time founded or established."

So far, it would seem at first sight that an *ikrar* or acknowledgment stands in the Muhammadan law much on the same footing as an ordinary admission as defined in s. 17 of the Evidence Act; and if the matter rested here, I confess I should have been inclined to regard the question as one appertaining to the province of the law of evidence. But acknowledgments of parentage under the Muhammadan law rest upon a footing higher than that of ordinary admissions as pure matters of evidence. The rules of the Muhammadan law applicable to such acknowledgments and the conditions under which such acknowledgments can be validly made are stated in the authoritative texts which my brother Straight has already quoted, and to those texts I wish to add a passage from the *Hedaya* which sums up the law upon the subject:—

"If a person acknowledge the parentage of a child who is able to give an account of himself, saying 'This is my son,' and the ages of the parties be such as to admit of the one being the child of the other, and the parentage of the child be not well known to

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any person, and the child himself verify the acknowledgment, his parentage is established in the acknowledger, although he (the acknowledger) be sick; because the parentage in question is one of those things which affect the acknowledger himself only and no other person. It is made a condition, in this case, that the ages of the parties be such as to admit of the relation of parentage; for if it were otherwise, it is evident that the acknowledger has spoken falsely. It is also made a condition that the parentage of the boy be unknown; for if he be known to be the issue of some other than the acknowledger, it necessarily follows that the acknowledgment is null. It is also made a condition that the boy verify the acknowledgment; because he is considered as his own master, as he is supposed able to give an account of himself. It were otherwise if the boy could not explain his condition; for then the acknowledgment would have operated without his verification. It is to be observed that the acknowledgment, in this instance, is not rendered null by sickness, because parentage is an original and not a supervenient want. By the establishment of the parentage, therefore, the boy becomes one of the acknowledger's heirs in the same manner as any of his other heirs" (Hamilton's *Hedaya* by Grady, p. 439).

In commenting upon this passage of the *Hedaya*, the author of the *Kifaya* points out that the rule as to acknowledgment of parentage is based upon the words of the Korán, "*call them after their fathers*;" and the author explains that such acknowledgment is sufficient, "because the burden of the obligation in respect of the child rests especially on the father, and the latter's acknowledgment affects himself personally and is thus accepted without any verification by the mother" (1). Another celebrated commentary on the *Hedaya*, the *Fathul Qadir*, in explaining the rule contained in the above passage as to the condition that the acknowledged child should be of unknown parentage, goes on to say that the condition has been imposed, because otherwise the

(1) لان النسب مما يلزمه خاصة قال الله تعالى ادعوهم لآبائهم و على المولود له رزقهن و لان مؤنة الولد على الاب خاصة فيكون اقراره به على نفسه فيقبل من غير تصديق الام (هداية مع شرحها الكفاية - جلد ٣ كتاب الاقرار صفحه ٥٨١) *

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descent of the acknowledged child could not be established from the acknowledger since "*descent after it is established is not susceptible of the annulment*" (1).

The last point is important, and is to the same effect as the text from the *Ashbah* and the first text from Vol. I of the *Fatawa-i-Alamgiri*, both of which are quoted in my brother Straight's judgments. The same rule is stated in another portion of the *Fatawa-i-Alamgiri*; and to use the words of Mr. Baillie's translation, "descent, when once established, cannot be dissolved or cancelled, neither can it be transferred from one person to another" (Baillie's Dig., p. 408).

The passage from the *Ashbah*, however, throws the greatest light upon the nature of such acknowledgments and their effect under the Muhammadan law. That passage shows that whilst ordinary acknowledgments stand upon one footing an exception is made in favour of such acknowledgments as relate to matters of *personal status*, and that in such cases the law does not allow cancellation or annulment of the acknowledgment. This peculiarity of such acknowledgments, that is, the permanency of their effect when duly made, upon the *personal status* of the persons in respect of whom such acknowledgments are made, is in itself sufficient to justify the conclusion that the acknowledgment of parentage, though it has reference to evidential presumptions and other considerations, is in effect a rule of *personal status* in the eye of Muhammadan law; and I am fortified in this conclusion by the uniform practice of the Courts in India and of the Privy Council in dealing with such questions as falling within the province of the Muhammadan law of inheritance and marriage.

The various propositions of the Muhammadan law as they apply to the fact of this case and the steps of legal reasoning upon which those propositions proceed may now be stated.

The right of inheritance under the Muhammadan law is based upon three grounds described by Mr. Baillie to be, "*nusub*, which

(1) و شرط ان لايكون له نسب معروف لانه اذا كان نسبه معروفا يمنع ثبوته من غيره لان النسب لايقبل الفسخ بعد ثبوته - (فتح القدير على الهداية - كتاب القرار باب إقرار المريض - فصل صفحه ٩١١) *

is *kurabat*, or kindred; special cause, which is marriage, that is, a valid marriage, for there are no mutual rights of inheritance by a marriage that is invalid or void, according to all, and *wula*, which is of two kinds, *wula* of emancipation and *wula* of *moowalat*, or mutual friendship." In this case we are concerned only with *nusub*, that is, relationship by consanguinity of descent, which in Muhammadan law means legitimate descent only, so far as inheritance from or through males is concerned, and marriage between the parents of the inheritor is a condition precedent to his legitimacy. "The intercourse of a man with a woman who is neither his wife nor his slave is unlawful and prohibited absolutely. When there is neither the validity nor the semblance of either of these relations between the parties, their intercourse is termed *zina* and subjects them both to *huad* or specific punishment, for vindicating the rights of Almighty God" (Baillie's Dig., p. 1). "The offspring of a connection where the man has no right nor semblance of right in the woman, by marriage or slavery, is termed *wulud-ooz-zina*, or child of *zina*, and is necessarily illegitimate." (26, p. 3). The *Durrul Mukhtar* states the acknowledged general rule that "an illegitimate child as well as a child of curse or imprecation inherits only from the relations on the mother's side by reason of its being no residuary and having no father" (Tagore Law Lectures, 1873, p. 123. The same is the effect of the rule as stated in Rumsey's Chart of Muhammadan Inheritance (p. 342, 3rd ed.); and it is more fully expressed in *Aini*, where it is laid down that "illegitimate children and children of curse do not inherit, except from the mother's side, because their parentage on the father's side is wanting; so they do not inherit from their putative fathers, but as their parentage on the mother's side is established, they, on account of such parentage, inherit only from their mothers and half brothers by the mother's side the legal shares and no more." (Tagore Law Lectures, 1873, p. 123). "When a man has committed *zina* with a woman, and she is delivered of a son whom he claims, the descent of the son from the man is not established, but it is established from the woman by the birth" (Baillie's Dig., p. 411).

From these passages two points are perfectly clear, *viz*, *first*, that, so far as inheritance from males or through males is concerned, the existence of legitimacy of descent or consanguinity is a condition

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precedent to the right of inheritance; and *secondly*, that such legitimacy depends upon a valid marriage or connection between the parents of the inheritor. Now, the Muhammadan jurists themselves in dealing with the question of parentage, *nusub*, or relationship by consanguinity, recognise a distinction between cases in which inheritance is claimed from or through the father and inheritance claimed from or through the mother. "Maternity admits of positive proof, because the separation of a child from its mother can be seen. Paternity does not admit of positive proof, because the connection of a child with its father is secret; but it may be established by the word of the father himself or by a subsisting *firash* (bed), that is, a legally constituted relation between him and the mother of the child" (Baillie's Dig., p. 389). And it may be taken as an undoubted proposition of the Muhammadan law of inheritance that in no case can an illegitimate child, that is, the offspring of *zina* or illicit intercourse, be entitled to inheritance from his father or through him, because he is regarded as *nullius filius*, that is, a person whose *nusub* or descent from the father is wanting.

I have already said that in the case of establishing descent from a mother and claiming inheritance from her, legitimacy is not a condition precedent to such right of inheritance; but in the case of inheritance from the father legitimacy is absolutely necessary before any such right can be claimed. The question then is, whether in cases like the present, where the paternity of a child, that is, his legitmate descent from his father, cannot be proved by establishing a marriage between his parents at the time of his conception or birth, the Muhammadan law recognises any other method whereby such marriage and legitmate descent can be presumed, inferred, or held to be established as a matter of substantive law for purposes of inheritance.

In dealing with this part of the case much help is rendered by the case-law upon the subject. In *Khajah Hidayat Ooluh* v. *Rai Jan Khanum* (1) the principle was laid down by the Lords of the Privy Council "that, under the Muhammadan law, where a child has been born to a father of a mother where there has been

(1) 3 Moo. I. A. 295.

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not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan law, the presumption is in favour of such marriage having taken place;" and their Lordships go on to add, "that in considering this question of Muhammadan law we must, at least to a certain extent, be governed by the same principles of evidence which the Musalmán lawyers themselves would apply to the consideration of such a question" (p. 318). The general effect of the ruling in that case is that continual cohabitation of the parents and acknowledgment of the child by the father is presumptive evidence of marriage between the parents and of the legitimacy of the offspring. Their Lordships had to deal with a similar question in *Mahomed Hauker Hoossain Khan* v. *Shurf-oon-nissa Begam* (1) in which their Lordships held, that although by the Muhammadan law the legitimacy of a child of Muhammadan parents may be presumed or inferred from circumstances, without any direct proof either of a marriage between the parents or of any formal act of legitimation, in the absence of evidence or circumstances sufficient to found such a presumption or inference, a claim by a party as a legitimate son to share in an intestate's estate should be dismissed. But whilst laying down this rule their Lordships went on to say:—"But in arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Muhammadan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents or of any formal act of legitimation" (p. 159).

The exact effect of the these rulings was again considered by their Lordships in the important case of *Ashruf-ood-Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (2), where their Lordships observed:—

"The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and

(1) 8 Moo. I. A. 136. (2) 11 Moo. I. A. 94.

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is not antedated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of facts. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override over-balancing proofs, whether direct or presumptive" (pp. 113-14).

This passage, if taken as an abstract enunciation of the law, might lend colour to the contention that even a child whose *illegitimacy* is *proved* may be legitimated by an acknowledgment, and indeed it was upon this interpretation of that passage that a considerable portion of the argument on behalf of the plaintiffs-appellants proceeded. But the Lords of the Privy Council themselves in *Muhammad Azmat Ali Khan* v. *Musammat Lalli Begam* (1) took occasion to explain the exact effect of that passage and went on to say:—

"These observations must be taken with a reference to the facts of that case, and in that case it appeared that there was a *Moottah* marriage after the birth of the child. There was no acknowledgment, and the treatment of the child was equivocal. Sometimes he was treated as son and at others not; and indeed by a deed executed by the father for that purpose he was distinctly repudiated by him as his son. In that case it was decided that in the absence of express acknowledgment, the evidence was insufficient either to raise the presumption of a marriage which in point of time would cover the birth of the child or of an acknowledgment. The facts and

(1) L. R. 9 I. A. 8; I. L. R. 8 Calc. 422.

questions in that case were very complicated, and some of the passages in the judgment referred to by the Judge below can only be understood by referring to the question to which they were addressed" (p. 19).

These observations are, in my opinion, an important limitation upon the interpretation of the passage on which so much reliance was placed at the Bar in the argument for the appellants. The general effect of the ruling in the case last cited is that, according to Muhammadan law, the acknowledgment and recognition of children by a father as his sons gives them the status of sons capable of inheriting as legitimate sons, and this rule was affirmed again by the Privy Council in *Sadakat Hossein* v. *Syed Muhomed Yusuf* (1), where their Lordships expressly refrained "from offering any opinion upon the very important question of law" whether "the offspring of an adulterous intercourse could be legitimated by any acknowledgment" (p. 36).

This last reservation is to my mind a most significant one, as showing that the passage which I have quoted from their Lordship's judgment in *Ashruf-ood-Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (2) must not be understood loosely in the sense of being an abstract enunciation of the law applicable to all cases; for I cannot help feeling that if that passage were to be interpreted loosely and regardless of the facts of the case in which those observations were made, there would have been no necessity for reservation of opinion by their Lordships in the case of the acknowledgment of an offspring of an adulterous or even of an incestuous intercourse. Illegitimacy under the Muhammadan law, as indeed under other systems, arises from the absence of a lawful matrimonial relation between the parents of the child; and if illegitimacy which is *proved and placed beyond doubt* were no impediment to an acknowledgment, there would no be logical reason why the offspring of an adulterous or incestuous intercourse should not acquire the status of legitimate children when acknowledged by the father.

After having carefully considered the various rulings of the Lords of the Privy Council in the cases to which I have referred, I am of opinion that their Lordships never intended to go the

(1) L. R., 11 I. A., 81; I. L. R., 10 Calc. 903. (2) 11 Moo. I. A. at p. 113.

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length of laying down the rule that a child who is *proved* to be illegitimate, either in consequence of marriage between his parents being *disproved*, or being unlawful, could be legitimated by an acknowledgment. All the cases which their Lordships had before them were cases in which the question of marriage itself was a matter in dispute and involved in obscurity with reference to the legitimacy of the child. In other words, those cases were such as left either the fact or the exact time of the alleged marriage a matter of uncertainty, that is, neither *proved* nor *disproved*; and their Lordships in dealing with those cases applied the principles of the Muhammadan law of acknowledgment of parentage with reference to legitimacy for purposes of inheritance. Any other view of those cases would involve the proposition that their Lordships intended to go far beyond the authority of the Muhammadan law itself as to acknowledgments of parentage and legitimacy for purposes of inheritance.

Yet such was the effect of the argument addressed to us in support of the appeal, and indeed that argument went the length of contending that the Muhammadan law as to acknowledgment of parentage was nothing more or less than a substitute for affiliation by adoption as recognised by the Roman or the Hindu law, that is, an affiliation which has no reference either to the consanguinity of descent of the acknowledged child from the acknowledger or to the legitimacy of such descent. I have already said that this contention is not warranted by any of the rulings of the Lords of the Privy Council, and I now proceed to show that it is positively opposed to the rules of the Muhammadan law itself.

Not a single authority of that law has been quoted, and I am not aware of any, which would justify the conclusion that legitimacy of descent from a father is not an absolutely indispensible condition precedent to the very existence of the right of inheritance from the father, and I have already shown that children born of *zina* (which means fornication, adultery, or incest) can never be legitimated or entitled to inherit from their father. Nor can such children be made legitimate by any kind of acknowledgment where the illegitimacy is a *proved and established* fact. The Muhammadan law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to

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cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being *disproved*. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is *not proved* in the sense of the law as distinguished from disproved. In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child. This is abundantly clear from the authorities from which my brother Straight has already quoted. Among those authorities the passages from the first volume of the *Fatawa Alamgiri* may at first sight contradict the view to which have I given expression, and I am therefore anxious to explain that those passages have no such effect. The first of those texts only shows that an acknowledgment of parentage when duly made cannot be negatived. The second text, which relates to the case of a *majbub* (مجبوب) (1) acknowledging a child and such acknowledgment taking effect, notwithstanding the acknowledger's mutilated condition, proceeds upon the general principle of Muhammadan law against bastardizing children, and the words "*the child necessarily becomes his even without proof of sexual intercourse*" which occur in the text must not be understood to mean anything beyond the rule that even in such a case acknowledgment of parentage obviates the necessity of ascertaining either the time or the extent of the mutilation of the acknowledger's person. The text assumes the existence of a valid marriage and the possibility of the acknowledged child's legitimate descent from the acknowledger, and I have no doubt that it would be misunderstanding the text if it were held to mean that even where there is a physical impossibility of the child's descent from the acknowledger, the child becomes of one who could not be his father. The reason of the rule relates not to any theory of adoption, but to the theory that an

(1) From *jabb* (جب) which means the removal of the penis only. *Durr-ul-Mukhtar*, p. 267). See footnote at p. 27, Baillie's Dig.

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acknowledgment of parentage obviates any investigation as to the physical condition of the acknowledger's potency or impotency for procreating the offspring of a valid marriage. The same is the explanation of the latter part of the second text which my brother Straight has quoted from the *Fatawa Kazi Khan*.

The third text from the *Futawa Alamgiri* requires no explanation, but the fourth text does require reference to show that it does not contradict the view which I have taken as to the assumption of legitimacy being a condition precedent to the validity of an acknowledgment of parentage. Now that text begins by assuming that the offspring was the result of an illicit intercourse, but the birth of the child took place during lawful wedlock, and it was acknowledged by the father. Now, so far as my view that the assumption of a legitimate descent is a condition precedent to the validity of the acknowledgment of parentage is concerned, it is enough to point out that in the text itself the condition is imposed that the birth of the child should take place after the expiration of six months (the shortest period of gestation under the Muhammadan law) from the date of the marriage—a condition which proceeds upon the theory of the possibility of a legitimate birth. The same is the theory upon which the latter part of the text proceeds, although it relates to birth within six months of the marriage, because the implication there is that the acknowledgment of the father must be taken to involve the possibility of a legitimate intercourse between the parents of the acknowledged child at the time of his being begotten. The text would be misunderstood if not considered in the light of the circumstance that divorce under the Muhammadan law rests entirely with the husband, that it may under certain limitations be retracted by him, and that there may be a remarriage between the parties. It is no doubt in view of this circumstance that the Muhammadan jurists have placed acknowledgment of the parentage of a child by a man upon an exceptionally strong footing, as obviating the necessity of an investigation into facts which would otherwise be necessary to establish the legitimacy of the child, with reference to the marriage of his parents, the period of his conception, and the date of his birth. The principle of the Muhammadan law on this head is much the same

as that adopted by the Courts of justice in England, where the rule is represented by the maxim *semper praesumitur pro legitimatione puerorum*, or by a cognate rule *semper praesumitur pro matrimonio*, the authority of which was recognised in *Piers* v. *Piers* (1). And it is important to observe that in the very text with which I am now dealing it is expressly indicated that an acknowledgment of parentage is ineffective if accompanied by an intimation that the acknowledged offspring was the result of an illicit intercourse. The words of the text are:—"*if he says that the child is born of me by illicit intercourse, the descent is not established and he will not inherit from him*," and they leave no doubt in my mind that it is only by misapprehension of the principles of Muhammadan law that it can be held that a person *proved* to be a *walad-ooz-zina*, that is, the offspring of a fornication, adultery, or incest, can ever be legitimated by any kind of acknowledgment by the father. It is upon the same principles that the first and third texts from the *Fatawa* *Kazi Khan* quoted by my brother Straight must be explained, and the latter part of the first text, as also the third text, show that the matter as to the effect of acknowledgment of parentage, though a rule of substantive law, proceeds entirely upon an assumption of the possibility of legitimate descent of an acknowledged child from the acknowledger, and that the rule as to the effect of such acknowledgment does not extend to cases where such legitimate descent was impossible owing either to the impossibility of a valid marriage between the parents of the child, or owing to the existence of such a marriage being disproved by trustworthy evidence. And I have no doubt that I am representing the views of the Muhammadan jurists rightly when I say that there is no warrant in the principles of the Muhammadan law to justify the view that a child proved to be the offspring of fornication, adultery, or incest could be made legitimate by any act of acknowledgment by the father. I repeat that the rule is limited to cases of *uncertainty* of legitimate descent and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment.

(1) 2 H. L. Cas. 331.

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I have dwelt upon this point at such length because the judgment of Petheram, C. J., now under appeal begins by saying :—

"The evidence in this case proves, in my opinion, that the plaintiff-appellant Allahdad was the illegitimate son of Ghulam Ghaus Khan. I also think upon the evidence that he was born before the marriage of Ghulam Ghaus Khan with Moti Begam, and therefore it has been established that he was, in the inception at all events, an illegitimate son of his father."

Similarly, my brother Brodhurst, in summing up the effect of the evidence in this case, went even further than Petheram, C. J., in saying :—

"The following appears to be the established facts :—that Allahdad was not born in wedlock ; that he was the son of Moti by an unknown father ; that his mother was at the time of his birth and up to the time that she married Ghulam Ghaus a prostitute."

If I had taken the same view of the evidence as Petheram, C.J., or my brother Brodhurst, as to the parentage or birth of Allahdad, I should have found it impossible to have favoured his claim ; but according to the view of the facts which my brother Straight has taken, and in which I concur, the date of the marriage of Ghulam Ghaus with Moti Begam with reference to the birth of Allahdad is wholly uncertain owing to want of trustworthy evidence, and, indeed, it is not even established that he was the natural son of Ghulam Ghaus. But direct evidence of paternity is not to be expected in such a case any more than in a case where the question of alleged illegitimacy does not complicate the facts. Indeed, in the Muhammadan law, as in other systems of jurisprudence, direct proof of paternity is not required, and rules of presumption more or less stringent are adopted by various systems as furnishing the place of absolute proof of paternity which, *ex necessitate rei*, cannot be proved by positive and direct evidence, because, as the *Fatawa Alamgiri* puts it, "the connection of a child with his father is secret," as distinguished from "maternity, which admits of positive proof, because the separation of a child from its mother can be seen." To sum up the matter, I agree in the views of my brother Straight in holding that the entire question of the descent, birth, and legitimacy of Allahdad is involved in obscurity owing

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to the exact date of his mother's marriage with Ghulam Ghaus being unascertainable, and that, therefore, this case presents all those conditions to which the Muhammadan law as to the acknowledgment of parentage is most appropriately applicable; and further, as my learned brother has shown here, the requisite acknowledgment in words and by treatment was made by Ghulam Ghaus without any such intimation of Allahdad being the offspring of illicit intercourse as would vitiate the effect of the acknowledgment according to the texts which my learned brother has quoted.

Such being my view of the facts of the case, it is not necessary to enter into any elaborate discussion as to how far the provisions of s. 112 of the Indian Evidence Act (I of 1872), as to birth during wedlock being conclusive proof of legitimacy, would affect a case such as this. That section of course proceeds upon adopting the period of birth, as distinguished from conception, as the turning point of legitimacy. "It is a peculiarity of the English law that it does not concern itself with the conception, but considers a child legitimate who is born of parents married before the time of his birth, though they were unmarried when he was begotten" (Lord Mackenzie's Roman Law, p. 130, 4th ed).

That peculiarity of the English law has no doubt been imported into India by s. 112 of the Indian Evidence Act, and it may some day be a question of great difficulty to determine how far the provisions of that section are to be taken as trenching upon the Muhammadan law of marriage, parentage, legitimacy, and inheritance, which departments of law under other statutory provisions are to be adopted as the rule of decision by the Courts in British India. Fortunately the difficulty does not arise in this case owing to the date of the marriage of Ghulam Ghaus with Moti Begam with reference to the birth of Allahdad being uncertain, and I need not therefore refer to the difficulty any further than by saying that there is enough authority in the texts of the Muhammadan law to show that, under that system of jurisprudence, questions of legitimacy are referred to the date of the conception of the child and not to the period of his birth.

Nor need I dwell much upon that part of the argument of the learned Pandit for the appellant which aimed at showing that the

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Muhammadan rule as to the acknowledgment of parentage is only a substitute for adoption as understood in the Hindu and the Roman system of jurisprudence, or that the rule of the Muhammadan law is the same as the Roman or the Scotch rule relating to the legitimation of children *per subsequens matrimonium*, that is, legitimation of ante-nuptial children whose illegitimacy is proved and admitted by subsequent marriage between the parents. So far as the argument refers to the Hindu law of adoption, I need only say, with reference to the numerous authorities which were considered by me in *Ganga Sahai* v. *Lekhraj Singh* (1), that adoption under that system has no reference to the natural descent of the adopted child from the adoptive father; that adoption, at least in its principal form, is established by a gift from the parents of the child to the adoptive parents; that the power of adoption itself is based upon religious considerations relating to the spiritual welfare of the adoptive father in the life to come after death; that the effect of such adoption takes away the adopted child from the family of his natural parents and affiliates him to the family of the adoptive father. Further, under that law only male children can be adopted for religious reasons, although no doubt secular considerations, such as the continuity of a family and devolution of inheritance, may form motives of adoption. None of these main elements of the theories upon which the Hindu law of adoption proceeds is common to the Muhammadan law, for there, as I have shown, acknowledgment of parentage proceeds upon the theory of actual descent of the acknowledged child (whether male or female) from the father who acknowledges it, and such descent being the result of a legitimate intercourse between the parents, and when either of these two essentials is disproved, the one by proving that the acknowledged child is the offspring of another man, the other by proving either that marriage between the acknowledger and the mother of the child was impossible or did not exist at the time which would make the child legitimate, the acknowledgment itself would be ineffective.

For similar reasons there is absolutely no analogy between the Roman law of adoption and the Muhammadan law of the acknowledgment of parentage. Under the Roman system adoption,

(1) I. L. R. 9 All. 253.

whether in the form of *arrogatio* or in the later form of *adoptio* proper, was simply one of the methods of acquiring *patria potestas*, that is, the rights of control enjoyed by the head of a Roman family over his children, and it went through various stages of modification both as to the method by which it was acquired and as to its conditions and effects upon the adopted children. The history of the law and its rules have been well summarized by Mr. Hunter in his work on Roman Law (pp. 58-66), and by Colquhoun in his work on Roman Civil Law (Vol. I., ss. 683-705, pp. 545-558). It is not necessary to enter into any detail of the reasons and rules which distinguish the Roman adoption from the Muhammadan law as to the acknowledgment of parentage, and it is enough to say that before the age of Islam adoption by a feigned parturition was common and well recognized among the ancient Arabs, that the cognate as well as the agnate rights were attributed to children so adopted, and that such adoption and its legal effects were abrogated by the express words of the Koran and have never since found a place in Muhammadan jurisprudence in connection with marriage, inheritance, or for any other legal purpose (see Colquhoun's Roman Civil Law, s. 707, Vol. I, p. 559).

Then, so far as legitimation is concerned as a rule of the Roman Law and of the Scotch Law, I need only refer again to Colquhoun's Roman Civil Law (ss. 660, 666, 667, and 683) and to Lord Mackenzie's Roman Law (pp. 130-34), which describe the rules, conditions, and effect of legitimation under both those systems, and it only requires a comparison between those rules and the rules of the Muhammadan law as to acknowledgment of parentage to show that no analogy exists between the principles upon which those rules proceed and those upon which the Muhammadan rule of the acknowledgment of parentage is founded. Putting the matter shortly, the former two systems proceed upon the principle of legitimating children whose illegitimacy is proved and admitted, whilst the Muhammadan law relates only to cases of uncertainty and proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union between the acknowledger and the mother of the child. To illustrate this distinction I may refer to the rule adopted

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in Scotland, and I may also say in France (Lord Mackenzie's Roman Law, pp. 132-33), as to the legitimation of ante-nuptial children by reason of a subsequent marriage between their parents—*per subsequens matrimonium*. In both those countries the marriage itself, subject to certain restrictions, has the legitimating effect. No such rule is known to the Muhammadan law, and we should really be introducing doctrines foreign to that system if, influenced by the analogies furnished by the Roman, the French, or the Scotch law of legitimation, we were to place acknowledgment of parentage under the Muhammadan law on the same footing as the rule of legitimation *per subsequens matrimonium* rests on in the foreign systems of law to which I have referred.

It is apparent from what I have said that I fully concur with my brother Straight as to the weight of evidence and the facts of this case, and that I have as a matter of law arrived at the same conclusion as he has arrived at with reference to the status of the plaintiff Allahdad to be that of a legitimate child of Ghulam Ghaus, and as such entitled to inherit from the latter and entitled to maintain the suit. But then comes a question upon which, unfortunately, I am unable to agree with my learned brother, namely, the question as to what order we should pass upon this appeal. The facts of the case and the pleadings of the parties show that this is one of those cases which fall within the purview of the Full Bench ruling of this Court in *Jafri Begam* v. *Amir Muhammad Khan* (1) and of a Division Bench ruling in *Muhammad Awais* v. *Har Sahai* (2). These rulings show that no absolute and unconditional decree should be passed for possession in favour of the plaintiff, if it is true that during his remaining out of possession debts due by the deceased Ghulam Ghaus Khan were lawfully paid by the heirs in possession. If such payment of debts be proved, the effect would be that the payment of a proportionate share of such debts would be a condition to which the decree in favour of the plaintiffs would be rendered subject with reference to the various equities that may arise in the case.

Have we, then, upon the record any material for framing such a decree? The learned counsel for the parties are agreed that there is no sufficient material upon the record to enable us to frame such

(1) I. L. R. 7 All. 822. (2) I. L. R. 7 All. 719.

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a decree. All that is contended by the learned Pandit for the appellants is that, in the absence of such materials, it is the duty of this Court as the Court of appeal to decree the suit absolutely without any further remand for a proper trial of the points upon which the equities aforesaid would proceed. It is important to observe that not only the heirs of the deceased Ghulam Ghaus Khan, but also three lessees, were parties defendants to the suit, and it is clear that in a suit of this character, if the Court below had framed adequate issues arising out of the proceedings of the parties and after taking evidence thereon had adjudicated upon those issues, we should have been bound by s 564 of the Code of Civil Procedure to go ourselves into the merits of the evidence and to refrain from a remand such as s. 562 of the Code contemplates. But for the reasons stated by the learned Chief Justice such is not the case here; and agreeing with him in the interpretation of the law upon the subject of remand for new trials under s. 562 of the Court of Civil Procedure, I hold that all that the learned Judge of the lower Court tried and decided in this case was the preliminary question of the plaintiff Allahdad's status to sue as the heir of the deceased Ghulam Ghaus, and that, by reason of the view taken by that Judge upon this point of status, the rest of the case was not tried upon the merits, and that, therefore, the case is a fit one for remand under s. 562 of the Code of Civil Procedure.

I agree with the learned Chief Justice in the order which he has made.

Cause remanded.

Before Mr Justice Straight and Mr Justice Tyrrell

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January 11.

HASHMAT BEGAM AND ANOTHER (PLAINTIFFS) v MAZHAR HUSAIN AND OTHERS (DEFENDANTS) *

Limitation—Suit by Muhammadans for possession of immoveable property by right of inheritance to mother—Act XV of 1877 *(Limitation Act), sch. ii., Art* 141.

Plaintiffs sued for their share in the estate of their deceased father and mother. The defendants were the brother and a sister and a step mother of the plaintiffs. As regards the claim of the plaintiffs to their shares in the estate of their mother, the defendants pleaded that the same was barred by limitation inasmuch, as their mother died on the 22nd January, 1873, and the suit was not instituted till the 20th of January, 1885. The Court below finding that the mother died on the 22nd January,

* First Appeal No 124 of 1886 from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 29th March, 1886.

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1873, held that art. 141, sch. ii, Limitation Act, barred the claim and dismissed the suit.

Held that art. 141 of the Limitation Act does not apply to a suit by an heir-at-law for possession of immovable property in that character, but to a suit by a Hindu or Muhammadan who, prior to the death of a female, occupied the position of a remainderman or reversioner or a devisee, and on the death of the female sues on the basis of that character.

THE facts of this case are stated in the judgment of Straight, J.

Hon'ble *T. Conlan* and Mr. *Amir-ud-din*, for the appellants.

Mr. *C. H. Hill* and Mr. *Abdul Majid*, for the respondents.

STRAIGHT, J.—In the suit to which this appeal relates there were two plaintiffs, the appellants before us, Musammat Hasmat Begam and Musammat Ishrat Begam. The defendants to that suit, who are respondents before us, were Mazhar Husain, the brother of the plaintiffs, Husaini Begam, wife of Mazhar Husain, Musammat Khudayat-ul-Kubra, the sister of the plaintiffs, and Musammat Wajid-un-nissa, the second wife of Kamar-ud-din, the deceased father of the plaintiffs and defendants (1) and (3). It may be convenient also to state here that Kamar-ud-din, the father of the plaintiffs and defendants (1) and (3) and the husband of defendant No. (4), had a brother of the name of Zain-ul-Abid; and that his first wife was one Musammat Sakina Bibi, who predeceased him. The property, which is the subject of the present suit is of two kinds: first, the interest which the plaintiffs claim as the daughters of Musammat Sakina Bibi in their deceased mother's estate; and secondly, their shares in the estate left by their deceased father, Kamar-ud-din, who died upon the 25th May, 1874. The case for the plaintiffs in regard to these two properties was that as to each of them they were severally entitled to six sihams; that their sister, the defendant Khudayat-ul-Kubra, was also entitled to six sihams; and that the principal defendant, Mazhar Husain, their brother, was entitled to the residue of 12 sihams out of the 30 sihams into which the properties were divisible. Such were the claims in respect of which the plaintiffs brought their present suit, and the grounds upon which they based their cause of action for coming into Court was, that by reason of certain alienations of the property of their deceased father and mother made by their brother Mazhar Husain in favour of his wife, the second defendant and daughter

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of their father's brother, Jamal-ud-din, they had been prejudiced in their rights by inheritance. In regard to that portion of the property which belonged to the estate of their mother Sakina Bibi, they no doubt said in their plaint, as part of their statement of the facts, that her death took place upon the 2nd February, 1873. The nature of their claim being that which I have indicated, it was met by a long statement of defence filed by the defendant Mazhar Husain, the real answering defendant, which, when we come to analyze it, sets up three main contentions:—First, that Musammat Sakina Bibi did not die on the 2nd February, 1873, but on the 22nd January, 1873, and, therefore, that the suit, *quoad* that portion of the property claimed is, as to both the plaintiffs, barred by limitation; secondly, that if it is not barred, then that, *quoad* the claims of the plaintiffs to the property both of Musammat Sakina Bibi and of Kamar-ud-din, there has been upon their parts a relinquishment of their rights of inheritance; and, lastly, it is urged that, even assuming the rights of the plaintiffs have not been relinquished, they are bound to repay to the defendant, before they can succeed in this suit, their shares of certain debts of their deceased father Kamar-ud-din, which have been satisfied by the defendant.

As to the first of these matters, an issue was framed and tried by the learned Judge below, namely, whether Musammat Sakina Bibi died upon the 2nd February, 1873, as alleged by the plaintiffs, or on the 22nd January, 1873, as alleged by the defendant. Upon this point the Subordinate Judge found against the plaintiffs and in favour of the defendant, and his finding was that the death of Musammat Sakina Bibi took place upon the 22nd January, 1873. The learned Subordinate Judge acting upon that finding has, so I understand him, held that art. 141 of the Limitation Law is applicable to the suit, and that it, having been instituted upon the 29th day of January, 1885, is beyond time, such date being more than twelve years from the date of the death of Musammat Sakina.

As to the first point impeaching this finding of fact, I listened to Mr. *Conlan's* argument with very great attention, and gave full weight to his criticisms of the witnesses for the defendants, and of the views expressed by the Subordinate Judge as to the value to be attached to the testimony on the one side and the other. Having fully considered all that evidence

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as it bears upon this point, I think it enough to say, without travelling through it in detail, that I am of opinion the Subordinate Judge was right in coming to the conclusion he did, and that the weight of evidence does appear to me to be in favour of the allegations made on the part of the defendants, that the 22nd January, 1873 was the date of the decease of Sakina Bibi.

Then arises the question whether art. 141 of the Limitation Act is applicable. Upon consideration, I am inclined to think that it is not. I have come to the conclusion, though not without doubt, that the suit therein provided for is one by a Hindu or Muhammadan who, prior to the date of the death of the female, occupied the position of a remainder-man, or reversioner, or of a devisee, by devise, after the death of the female, instituting a suit on the basis of such title as remainder-man, reversioner, or devisee, and that it does not apply to the case of an heir-at-law suing for the possession of immoveable property in that character. I say I have come to this conclusion not without doubt; but it seems to me that when there is doubt upon a question of limitation, and another article can be found which reasonably applies to the suit, it is right to adopt it. From the assertion of the defendant himself in the 9th paragraph of his statement of defence, and from the circumstances disclosed, I think that the property left by Sakina Bibi and Kamar-ud-din may be regarded as joint family property of the kind mentioned in art. 127 of the Limitation Act. If this be so, then it is clear that knowledge of their exclusion from their shares therein was not acquired by the plaintiffs till a date which would bring the suit well within the period provided by that article. But if this article be not applicable, the plaintiffs can fall back upon the limitation of art. 144, and as no adverse possession has been pleaded or shown—indeed, the inference from the relation between them and the defendant rather pointing to a contrary inference—the suit under that article would also be within time. In this view the matter stands thus, that the plaintiffs are persons who, as the daughters of Sakina Bibi and Kamar-ud-din, are entitled to a share in the inheritance of the estates left by those two persons, and it rests with the defendant Mazhar Husain to show either that, by relinquishment formally made and clearly and satisfactorily established, they have abandoned their interests in both properties,

or that by his adverse possession for a period of more than twelve years prior to the date of suit, he has obtained a proprietary title to their shares. [The rest of the judgment deals with the other questions of facts, which is not material for the purposes of this report to set out. The appeal was ultimately decreed with costs].

TYRRELL, J.—I entirely concur.

Appeal decreed.

Before Mr. Justice Straight.

GANGA PRASAD AND ANOTHER (DEFENDANTS) *v.* BALDEO RAM AND OTHERS (PLAINTIFFS).*

Act XII of 1881 *(N.-W. P. Rent Act), ss.* 84, 148—*Suit to contest demand of distrainer—Intervenor—Decree of Rent Court in such suit not conclusive in civil suit for declaration of right to and possession of land—Limitation for such suit.*

Decree of a Rent Court passed upon enquiries made under ss. 84 and 148 of the Rent Act (XII of 1881) is not conclusive as between the parties to the enquiry, upon the question of title, in a suit instituted in a Civil Court for declaration of right to, and possession of, the land in respect of which the Rent Court decree was passed.

The period of limitation, for instituting a suit in the Civil Court as prescribed in these sections, apply only to suits brought by plaintiff, or unsuccessful intervenor to have it declared that plaintiff had a title to receive the particular rent claimed, and which the Rent Court has refused to give him; and not to suits for declaration of title to, and possession of, the land in respect of which the rent accrued due.

In the year 1881, plaintiffs had, under the provision of the Rent Act (XII of 1881), made a distraint for rent alleging to be due by one of their tenants. The tenant contested the legality of the distraint by a proceeding in the Rent Court, and the defendant intervened on the ground that he had been actually and in good faith in receipt and enjoyment of the rent of the land occupied by the tenant. On the 28th of June, 1881, Rent Court decided against the defendant; but owing to some irregularity the distraint was withdrawn. Plaintiffs subsequently instituted a suit in the Rent Court against the tenant for recovery of arrears of rent and the defendant again intervened, and upon enquiry under s. 148 of the Rent Act (XII of 1881), plaintiffs' suit for arrears of rent was dismissed. Plaintiffs then instituted this suit in the Civil Court for declaration of their right to, and possession of, the land in respect of which distraint proceedings had been taken and suit for recovery of arrears of rent instituted. The Court of first instance dismissed the suit on the merits. The plaintiffs appealed and urged, *inter alia*, that the defendant was estopped by the decision of the 28th June, 1881 from contesting plaintiffs' title.

Held that the decision of the 28th June, 1881 in the enquiry held under s. 84 of the Rent Act (XII of 1881) was not conclusive between the parties in a subsequent

* Second Appeal No. 1918 of 1886 from a decree of Maulvi Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 9th July, 1886, reversing a decree of Maulvi Muhammad Aziz Rahman, Munsif of Bansgaon, dated the 16th April, 1886.

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suit between them to determine their title to the land in respect of which the distraint proceedings had been taken.

THE facts of this case are stated in the judgment.

Munshi Juala Prasad, for the appellants.

Mr. *Simeon*, for the respondents.

STRAIGHT, J.— This is a suit for declaration of title to and possession of 1 bigha 12 pie *kham* land numbered 98 in the revenue registers. It will be seen that there are two defendants to the suit, one Ganga Prasad and the other Mital Kuhar, and their position in regard to the litigation will be explained by a statement of the following facts, which the learned pleaders for the parties at the hearing informed me were the facts out of which the suit has arisen. It appears that some time before 1881, the plaintiffs had under the provisions of the Rent Act made a distraint for rent which they alleged to be owing from the defendant Mital Kuhar. Mital contested the legality of that distraint by a proceeding in the Revenue Court, and under section 84 of the Rent Act the defendant Ganga Prasad intervened, and the question therefore came up for determination as to whether before and up to the time of the commencement of that suit in the Revenue Court the defendant Ganga Prasad had been in actual receipt and enjoyment of the rent of the land occupied by the defendant Mital. The Revenue Court decided against the claim of Ganga Prasad, but it was held that there had been irregularity in the plaintiff's distraint, and it was accordingly directed to be withdrawn.

Subsequently a second suit was brought in the Revenue Court by the plaintiffs to recover certain arrears of rent from Mital, and again Ganga Prasad intervened, this time under section 148 of the Rent Act, the question thus raised for determination again being, who had in good faith received and enjoyed the rent of the land before and up to the time when the right to sue claimed by the plaintiffs had accrued. On this occasion the Revenue Court took a different view and held that Ganga Prasad had established that he was the person who had had the receipt and enjoyment of the rent. Thereupon the present suit was instituted by the plaintiffs for, as I have already said, a declaration of their right to, and possession of, the land numbered

98. The first Court dismissed their claim upon the merits, and they then appealed to the lower appellate Court. Among their pleas there was one to the effect that the defendant Ganga Prasad was incompetent to set up any defence to the present suit, by reason of the first decision of the Revenue Court upon his intervention in the distraint suit under section 84, Rent Act. This plea has been accepted by the Subordinate Judge, and he has in effect found that the decision of the 28th June, 1881, of which I have spoken, precluded the defendant from raising his present defence.

It is argued before me that this is an erroneous ruling in law, and that, whether the decision of the 28th June, 1881 could have made the question subsequently raised in the Revenue Court in the rent suit *res judicata* for the purposes of that tribunal, it can in no sense stand in the way of the defendant asserting his proprietary title to the land, in a suit in the Civil Court, brought against him and the occupier of the land, for a declaration of the plaintiff's proprietary title to the land. Three rulings of this Court were referred to by the appellant's pleader in the course of his argument, which are *Gopal* v. *Uchabal* (1), *Chotu* v. *Jitan* (2), *Muhammad Salim* v. *Abdul Rahim* (3).

To the first two of those rulings I was a party, and in one of them I pointed out what appeared to me to be the scope of inquiry by a Revenue Court, as sanctioned by the provisions of section 148 of the Rent Act. Those remarks apply by analogy to section 84, and I need only briefly repeat them by saying that in either case, it appears to me that the sole question upon which, as a question of fact, the Revenue Court has the power to determine, is as to whether the plaintiff in the suit or the intervenor has received the rent of the land before and up to the date when the plaintiff alleged that his right to sue accrued to him.

Then comes the point as to whether the last paragraphs of sections 84 and 148 of the Rent Act deprive the plaintiffs, who have been worsted in such a suit, when they came into the Civil Court for a declaration of their proprietary title to, and possession of, such land, of the ordinary limitation period that under the law regulating such matters would ordinarily apply to a suit of such a

(1) I. L. R. 3 All. 51. (2) Ibid. 63.
(3) Weekly Notes, 1885, p. 261.

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description, by reducing the twelve years' term to a term of one year. It has been ruled by my brothers Brodhurst and Tyrrell in effect that it does not, and I believe this to be a sound view.

All I understand those last paragraphs of sections 84 and 148 to say is, that when an intervenor has succeeded in a revenue suit in convincing a Revenue Court that he has been in receipt and enjoyment of certain rent distrained for or claimed, or *vice versâ*, that the plaintiff or the unsuccessful intervenor may go to the Civil Court with a suit to have it declared that he had a title to receive that particular rent, which the Revenue Court refused to give him, and that if he does institute such a suit, he must do so within one year from the date of the Revenue Court's decision. I cannot hold that by the terms of either of those paragraphs, the period of limitation provided for a suit for a declaration of title to and possession of immoveable property, in the limitation law, is thus summarily abridged. Such being the view I take, it follows that this appeal should succeed, and that the question of the proprietary title to the land should be determined upon the merits by the lower Court. I accordingly decree the appeal, and, reversing the decision of the Subordinate Judge, direct him to restore the appeal to his file of pending appeals and to dispose of it according to law. Costs hitherto incurred will be costs in the cause.

Cause Remanded.

REVISIONAL CRIMINAL.

1888
January 25.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* AJUDHIA SINGH AND OTHERS.

Limitation—Sanction to prosecution—Application for such sanction—Criminal Procedure Code, s. 195—*Act XV of* 1877 *(Limitation Act), sch. ii. art.* 178.

Rules of limitation are foreign to the administration of criminal justice, and it is only by express statutory provision that any rule of limitation could be made applicable to criminal cases.

Article 178, sch. ii., Limitation Act (XV of 1877), must be construed with reference to the wording of the other articles, and can relate only to applications *ejusdem generis*.

A suit was instituted for possession of certain land on which stood a factory. In proof of the claim the plaintiffs filed in court a *sarkhat* or lease, which was pronounced by the Munsif to be a forgery. Plaintiffs appealed up to the High Court, where, on the 24th June, 1886, the Munsif's decree was affirmed. Defendants then

applied to the Munsif for sanction to prosecute the plaintiffs for the offence of using a forged document knowing the same to be forged. Munsif refused to sanction the prosecution prayed for; but on application to the Sessions Judge such sanction was granted. On application to revise the Sessions Judge's order granting sanction, it was contended that, after the lapse of nearly three years, sanction to prosecute should not have been granted.

Held; that there is no fixed period of limitation for making applications for sanction under section 195 of the Criminal Procedure Code.

THIS was an application under section 489 of the Criminal Procedure Code to revise the order of the Officiating Sessions Judge of Gorakhpur, granting sanction to prosecute the petitioners for an offence punishable under section 471 of the Indian Penal Code. The facts under which the application was made are stated in the judgment of the Court.

Mr. *Niblett*, for the petitioners.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

MAHMOOD, J.—This is an application which invokes the interference of this Court, in the exercise of its revisional jurisdiction, on behalf of the petitioners, in respect of whom permission was given by the learned Sessions Judge to the opposite party for prosecuting the petitioners under section 471 of the Indian Penal Code. The petitioners produced in a former litigation a document which has been held by both the lower Courts to be a forgery, and that litigation came to an end on the 24th June, 1886, by a decision of this Court which was adverse to the interests of the present petitioners. Then, on the 6th November, 1886, the present application was made for a sanction to prosecute, such as is contemplated by section 195 of the Criminal Procedure Code, but the Munsif declined to give permission. The learned Sessions Judge, in the exercise of the powers of a Court of appeal, has, however, granted the sanction prayed for, and in disputing the propriety of this order, Mr. *Niblett* has relied mainly upon two points. In the first place, the learned pleader contends that there was such unreasonable delay as to bar the application, and, in the next place, he argues that under section 195 of the Criminal Procedure Code it was important for the Court granting sanction to obey strictly the provisions as to the specification of the circumstances as to the place where and the time when the offence was committed.

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As to the first of these points, I am not aware of any rule of law which subjects such applications to any period of limitation. Mr. *Niblett* relies on the general provisions of article 178 of the second schedule of the Limitation Act (XV of 1877) and contends that the clause gives indications of a period of three years within which such application should be made. I cannot accept this contention, because rules of limitation are foreign to the administration of criminal justice, and it is only by specific legislation that periods of limitation can be rendered applicable to criminal proceedings.

For instance in the second division of schedule II of the Limitation Act specific provision as to the period of limitation is made in respect of criminal appeals, and, it is no doubt, by reason of those express provisions that limitation is applicable to such appeals. But supposing no such provisions existed, I should probably have been inclined to hold that even in the case of appeals arising out of criminal proceedings, no period of limitation was applicable on general principles of the law; and the result of such a view would, no doubt be, to render it possible for a person convicted of a criminal offence to appeal at any time, at least during the continuance of the sentence passed upon him.

The present, however, is not a case of appeal, but only one of an application to obtain sanction for prosecution under section 195 of the Code of Criminal Procedure, and I have to consider whether article 178, schedule II, of the Limitation Act is applicable to the case. For the purposes of deciding this question, I need not determine "when the right to apply accrued" within the meaning of the third column of that article. The substantive portion of the article in describing the class of cases to which it is applicable runs as follows:—

"Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, section 230."

In order to interpret this clause, it is important to realize that the preamble of the Act itself, whilst making provision as to limitation governing "*suits*" and "*appeals*," expressly limits the scope of the enactment to "*certain applications*." In other words, the Act does not profess to provide for all kinds of applications what-

soever. This being so, it is important to notice that throughout the third division of schedule II of the Act no reference is made to any application arising out of proceedings under the Code of Criminal Procedure, and this circumstance taken with the language employed in the preamble of the statute, and also with the words of article 178 itself, leads me to the conclusion, that, that article is not applicable to applications under section 195 of the Code of Criminal Procedure. This view proceeds upon the same principle as the ruling of Westropp, C. J., in *Bai Manakbai* v. *Manakji Kavasji* (1), and of Wilson, J., in *Govind Chunder Goswami* v. *Rungunmoney* (2). The effect of those rulings is, that the general words of article 178 must not be read irrespective of the latter part of the article, which refers to the Code of Civil Procedure, and that the applications contemplated by the article must be taken to mean applications under that Code. Similar is the principle of the ruling of the Madras High Court in *Kylasa Gowdan* v. *Ramasami Ayyar* (3), and of the Bombay High Court in *Vithal Janardan* v. *Vithojirav Putlajirav* (4), and of the Calcutta High Court in the case of *Ishan Chunder Roy* (5), where Tottenham, J., laid down the general rule that article 178 must be construed with reference to the wording of the other articles and can relate only to applications *ejusdem generis*.

As to the next part of Mr. *Niblett's* argument, I have to consider the effect of the following paragraph of section 195 of the Code of Criminal Procedure :—

"The sanction referred in this section may be expressed in general terms, and need not name the accused person ; but it shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed."

It seems to me that the terms in which the learned Judge gave sanction in this case complied sufficiently with the provisions of this clause, because it specifies the Court and the occasion on which the offence is alleged to have been committed. Mr. *Niblett's* argument seems to proceed upon the contention, that the learned Judge in giving sanction, should have specified the place and occasion on which the alleged forgery was committed. But this contention is

(1) I. L. R. 7 Bomb. 213.
(2) I. L. R. 6 Calc. 60.
(3) I. L. R. 4 Mad. 172.
(4) I. L. R. 6 Bomb. 686.
(5) I. L. R. 6 Calc. 707.

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clearly unsound, because the offence charged is that described in section 471 of the Indian Penal Code, which refers to the *use* of a forged document, and such an offence in a case like the present would take place in the Court where the document is used and not at the place where it has been forged.

For the purposes of this case, I am not required to enter into the merits of the case as to how far the prosecution, if instituted, is likely to succeed, and it is enough to say that Mr. *Niblett's* argument on the points of law raised by him having failed, I see no reason to interfere with the order of the learned Judge, in exercising the revisional jurisdiction of this Court.

The application is, therefore, rejected.

Application rejected.

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January 27.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

ISHUR DAS AND ANOTHER (DEFENDANTS) *v.* KOJI RAM (PLAINTIFF).*

Question for Court executing decree—Money paid into Court by pre-emptor under Civil Procedure Code, s. 214—Suit for pre-emption dismissed on appeal—Suit for refund of money paid into Court—Civil Procedure Code, s. 244.

A suit for pre-emption was decreed conditionally on the plaintiff paying Rs. 1,595, which the Court determined was the amount of the sale-consideration. He paid the amount to the vendees and the payment was certified under s. 258 of the Civil Procedure Code. Subsequently the decree was modified on appeal by increasing the amount of sale-consideration to Rs. 1,995, which the plaintiff was required to pay as the condition of pre-emption. He never paid the difference between the amount fixed by the first Court and the sum fixed as the true price by the appellate Court and the suit consequently stood dismissed. He then assigned to the plaintiff in the suit his right to recover the amount, Rs. 1,595, from the vendees, who after unsuccessful application made to the Court of first instance, under s. 244 of the Civil Procedure Code, to recover the amount, instituted this suit.

Held; that the assignee was a representative of the plaintiff in the pre-emption suit, within the meaning of s. 244 of the Civil Procedure Code, and the suit was therefore barred under the provisions of that section.

One Balwant sold his right in Mauza Sakri to Kewal Ram and Ishur Das. Ram Lal brought a suit for pre-emption. On the

* Second Appeal No. 1765 of 1886 from a decree of M. S. Howell, Esq., District Judge of Aligarh, dated the 18th July, 1886, modifying a decree of Babu Abinash Chundra Banerji, Subordinate Judge of Aligarh, dated the 22nd May 1884.

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11th of February, 1880, he obtained a decree conditionally on the payment within thirty days of the sum of Rs. 1,595, the amount of the purchase money as determined by the Court. The vendees appealed to the Judge urging that the purchase money was Rs. 1,994-4-0. On the 22nd of April, 1880, their appeal was dismissed. Ram Lal paid Rs. 1,595 to the vendees, and a receipt was filed in Court on 16th August, 1880. The vendees, however, appealed to the High Court urging that Rs. 1,994-4-0 and not Rs. 1,595 was the true amount of purchase money, and on the 13th April, 1881, their appeal was allowed and Ram Lal was declared entitled to possession on payment of Rs. 1,994-4-0, within a month of the date of the receipt by the District Court of the decree of the High Court. Ram Lal did not pay the difference between the amount he paid, namely, Rs. 1,595 and the amount determined by the High Court as the true price, Rs. 1,994-4-0.

On the 15th of February, 1882, Ram Lal assigned to the plaintiff in this suit his right to get back the sum of Rs. 1,595 for the consideration of Rs. 1,500, and on the 21st March, 1882, plaintiff made an application to the Court of first instance to get back the amount Ram Lal had paid to the vendees. The application was contested by the vendees on the ground that plaintiff was not a representative of Ram Lal within the meaning of s. 244 of the Civil Procedure Code and it was refused. Plaintiff then instituted the present suit for recovery of the amount so paid by him as aforesaid, and the Subordinate Judge over-ruling all the objections of the defendants (vendees) decreed the claim. On appeal by the defendants the Judge holding that art. 62, sch. ii, of the Limitation Act (XV of 1887), applied to the suit, dismissed it. Plaintiff then appealed to the High Court, urging that art. 67 of the Limitation Act was not applicable to his case. His appeal was allowed and the case remanded to the District Judge for trial on the merits. The District Judge, after remand, confirmed the decree of the Subordinate Judge. The defendants (vendees) then brought this appeal to the High Court, urging that plaintiff being the assignee and therfore the representative of Ram Lal was precluded by the provision of s. 244 of the Civil Procedure Code from bringing a suit for the recovery of the amount.

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Hon'ble Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

BRODHURST AND TYRRELL, JJ.—The plaintiff in this action is the purchaser of an actionable claim held by one Ram Lal under the following circumstances. Ram Lal brought a pre-emption suit against the appellants here and obtained a decree from the first Court, conditionally on his payment to the appellants of Rs. 1,595, the price of the property that he was interested in. He procured the payment to the appellants of this money by a third person, and in concert with the appellants, he certified this payment to the Court in the sense of sections 257 and 258, Civil Procedure Code. But in the meantime, and prior to such payment, the appellants had appealed against the decree, fixing the price of the property which they had purchased at Rs. 1,595, and they obtained from the appellate Court a decree, raising that price, and declaring Rs. 1,994-4 to be the true price payable by Ram Lal to the appellants for the estate. Ram Lal never paid the difference between his deposit, Rs. 1,595, and the sum fixed as the true price by the appellate Court. He also did not take possession of the property, which he had sought to pre-empt. He made no application under section 244 of the Code for the recovery of his money paid to the appellants, under the mistaken belief on his part, that this price would not be altered by the Court in appeal. He assigned his rights to the recovery of this money from the appellants, to Koji Ram, the plaintiff in this suit and the respondent here, who brought the present action and has got a decree for part of his claim from the Court below.

The defendants have brought this second appeal and contend that the plaintiff has purchased an actionable claim from Ram Lal, which Ram Lal could not have sustained himself, and that, therefore, the plaintiffs suit was unmaintainable. It cannot be questioned for a moment that the plaintiff is in all respects in the shoes of his assignor Ram Lal, and that he cannot maintain any action of the kind which has been brought here which his assignor Ram Lal could not have sustained. We have only then to consider whether the present action would have been barred,

if Ram Lal had brought it, by the rule of section 244 of the Civil Procedure Code. It seems to us, that the claim of Ram Lal against the appellant, for the refund of the price of the property which he did not choose to take possession of, in consequence of the alteration of the price fixed for the same by the appellate Court, is a question arising between Ram Lal plaintiff in that former suit, and the present appellants-defendants in that suit, in which the pre-emptive decree was passed, in obedience to which Ram Lal deposited Rs. 1,595, and that this question related to the execution, discharge, or satisfaction of the decree. It is obvious that when the money was paid, the payment related to the execution, discharge, or satisfaction of the decree. But it is argued that when the time fixed by the appellate Court, for the payment of the increased price had expired, there was no decree in existence, and that, therefore, no question of section 244 can arise.

This is not a sound contention, for by the provisions of section 214 it is enacted, that when in a pre-emption suit "the Court finds for the plaintiff, if the amount of the purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property; but that if such money and costs are not so paid, the suit shall stand dismissed with costs." Accordingly, when at the expiry of the time fixed by the decree of the Court, the additional sum required to make up the full price, was not paid by Ram Lal, there stood and still stands the decree in the suit, dismissing Ram Lal's claim, and under that decree Ram Lal could have come under section 244, cl. (*c*), and could have raised the question whether Rs. 1,595, which he had paid in execution of the decree *nisi*, so to speak, was not repayable to him by the defendants, who had received it, when the decree assumed another aspect. It was argued by Mr. *Jogindro Nath*, on behalf of the respondent, that this question could not be called a question relating to the execution of the decree, inasmuch as, the execution of the decree was out of question at the time that Ram Lal could have applied for the restoration of the money; and secondly, because the payment

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having been made out of Court, that payment was not such as to raise a question relating to the execution of the decree.

As for the first argument, there was and is a decree in the case to which the question of the refund of Rs. 1,595 wrongly drawn by the defendant apportains. As to the other point, it is sufficient to say that the payment was made in full conformity with the provisions of section 258 of the Code and was a payment into Court. In this view of the matter, it seems to us that the action brought by Koji Ram, the representative and assignee of Ram Lal, is an action that was not sustainable under section 244 of the Code, and that the suit must be dismissed with costs; the result of which is that this appeal prevails with costs.

Appeal allowed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

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June 1.

GOKAL PRASAD (PLAINTIFF) *v.* RADHO (DEFENDANT).*

Easement—Privacy, right of—Custom.

A customary right of privacy, under certain conditions, exists in India and in the North-Western Provinces, and is not unreasonable, but merely an application of the maxims *sic utero tuo ut alienum non ladas* and *aedificare in tuo proprio solo non licet quod alteri noceat.*

A substantial interference with such a right, where it exists, if without the consent or acquiescence of the owner of the dominant tenement, affords such owner a good cause of action.

Each case in which such a right is in dispute, must be decided upon its own facts, the primary question in all cases being, whether, the privacy in fact, and substantially exists, and has been and in fact enjoyed. If this is answered in the negative, no further question arises. If in the affirmative, the next question is, whether, the privacy has been substantially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking relief against such acts.

In the case of a building for *parda* purposes, newly erected without the acquiescence of the owner of an adjacent building site, a custom preventing such owner from so building as to interfere with the privacy of the first new building would be unreasonable and consequently bad in law. But if such adjacent owner, without protest or notice, allowed his neighbour to erect and consequently to incur expenses in connection with a building for the use of *parda-nashin* women, a custom preventing him from interfering with the privacy of such new building would not, in India, be unreasonable. The Indian case law relating to the right of privacy reviewed.

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* Second Appeal No. 1682 of 1886 from a decree of E. Elliot, Esq., District Judge of Allahabad, dated the 18th August, 1886, reversing a decree of Babu Madhub Chunder Banerji, Munsif of Allahabad, dated the 9th July, 1886.

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THE facts of this case are fully stated in the judgment of Edge, C. J.

Mr. *G. T. Spankie* and Munshi *Ram Prasad*, for the appellant.

Pandit *Moti Lal Nehru*, for the respondent.

EDGE, C. J.—In this case the plaintiff brought his action alleging that the defendant had wrongfully built a new house in such a way that certain eaves of that new house projected over the plaintiff's land, and that a verandah and certain doors of that house interfered with the privacy of those portions of the plaintiff's house and premises which were occupied and used by the females of the plaintiff's family, and claimed to have the eaves in question, and the verandah removed, and the doors which were complained of closed. The females of the plaintiff's family are *parda-nashin* women. The plaintiff's house was admittedly an old one. The eaves of the defendant's new house do in fact project over the plaintiff's land. The doors in question open on to and afford access to the verandah. The doors, as admitted by the defendant in her deposition, interfere with the privacy of the plaintiff's female apartments. The Officiating Munsif of Allahabad, having considered some of the authorities bearing on the case, decreed the plaintiff's claim, as above stated, with costs. The District Judge of Allahabad, on appeal, reversed the decree of the Officiating Munsif. As to the claim for the removal of the eaves, the District Judge acted on a petition which was filed by the defendant in his Court. The petition was to the effect, that in case the plaintiff should hereafter desire to raise his wall, she, the defendant, would not object to the removal of the eaves complained of. It is obvious that instead of that petition affording a reason for the dismissing of that part of the plaintiff's suit which related to the removal of the eaves, it was practically an admission by the defendant that the plaintiff was entitled to have those eaves removed. As to that portion of the suit which related to the interference with the privacy of the plaintiff's premises, the District Judge, overlooking the admission of the defendant in his evidence, and being influenced by a personal inspection, came to the conclusion that the "doors could scarcely be said to inconvenience the plaintiff at all." The District

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Judge appears to have confined his attention in the inspection, to the effect of the doors in question on the privacy of the courtyard of the plaintiff, and to the position of that courtyard with regard to other houses in the neighbourhood. The District Judge in reversing the decree of the Officiating Munsif, dismissed the plaintiff's suit. From that decree of the District Judge this appeal has been brought.

As to the eaves, it is clear that the Munsif's decree was right and must be restored. As to the plaintiff's claim in respect of the interference with the privacy of his premises, we heard the arguments of the vakils on each side and took time to consider our judgment, not because my brother Mahmood or I had any doubts as to how we should decide, but because, owing to the conflicting authorities which were cited and to the importance in these Provinces of the question before us, we thought it advisable to consider those authorities at some length and to see if the records in this Court threw any additional light upon the subject.

The Indian Easements Act (V of 1882) has not been applied to these Provinces. This compels us to ascertain whether a right or easement of privacy is a right or easement which can be recognised by, what I may call, the common or customary law of India or of these Provinces, and further, whether such a right or easement does exist in these Provinces. With these objects in view, I have, so far as I am aware, considered all the reported decisions of the Courts in India to which I have access, and also the records of the unreported decisions of this Court which appeared to bear upon these questions. I shall now attempt to show, as shortly as I can, what have been the decisions in the cases which I have been able to examine. I shall, in the first place, go through the decisions of the Sadr Diwani Adalat of the North-Western Provinces and of the High Court; then I shall take such of the reported decisions of the High Courts at Calcutta, Madras, and Bombay, respectively, and of the Chief Court of the Punjab, as I have been able to find in the library of this Court.

The earliest reported case, decided by the Sadr Diwani Adalat of the North-Western Provinces in which the question of a right

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of privacy arose, is that of *Nuth Mull* v. *Zuka-oollah Beg* (1), in which Begbie, Smith and Jackson, JJ., held in 1855, on appeal from the decree of the Principal Sadr Amin of Delhi, that the erecting by the defendant of a new house, so that the plaintiff's premises were overlooked from the roof of the new house and their privacy thereby interfered with, gave the plaintiff a cause of action against the defendants. The Judges in that case differed only as to the nature of the relief to be granted.

In *Gunga Pershad* v. *Salik Pershad* (2) the plaintiff sued to close a window newly opened by the defendant, on the ground that it was an innovation which interfered with his privacy. The Munsif who tried the suit found that the window did not interfere with the privacy of the plaintiff as alleged, but held that the existence of the window was not to be made a plea by the defendant for hindering the plaintiff from, at any time, building a wall on his own land, which would have the effect of shutting up the defendant's window. The plaintiff did not appeal. The defendant appealed against so much of the decree as gave the plaintiff a right at any time to build a wall to shut up his window. Consequently the finding of the Munsif, that the defendant's window did not interfere with the plaintiff's privacy, stood. The Principal Sadr Amin of Allahabad on appeal reversed that portion of the Munsif's decree, the subject of the appeal. On special appeal to the Sadr Diwani Adalat of the North-Western Provinces, Ross and Roberts, JJ., in 1862, affirmed the decree of the Principal Sadr Amin, on the grounds that the relief decreed by the Munsif had not been sought by the plaintiff, and that the granting of that relief might interfere with the defendant's acquiring by prescription the right to enjoy the air and light afforded by the window which he had made. In that case it was not suggested by the Munsif, the Principal Sadr Amin, or the Judges of the Sadr Diwani Adalat that a right of privacy could not be acquired, the wrongful interference with which would give a cause of action.

In *Goor Dass* v. *Manohur Dass* (3), which was a special appeal to this Court from the decree of the Civil Judge of Benares reversing

(1) S. D. A. N. W. P. Rep., 1855, p. 92.
(2) S. D. A. N.-W. P. Rep., 1862, Vol. ii, p. 217.
(3) N.-W. P. H. C. Rep., 1867, p. 269.

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a decree of the Principal Sadr Amin of Benares, Morgan, C. J., and Spankie, J., in 1867, clearly recognised the right of privacy as a right existing in these Provinces. The whole of this judgment is instructive. It is as follows :—

"The Judge holds that the plaintiff cannot obtain the relief asked for, that is, the closing of the windows. His observation that the defendant has no objection to the plaintiff's putting up an ornamental screen, opposite to and within a few feet of the windows, leads to the conclusion that the defendant's right had been established, and that it was by concession on his part that this degree of obstruction by the plaintiff would be permitted. But the question of right has not been duly considered by the Judge. If the windows are not new, or are mere substitutions for former openings which had long existed, the defendants may have a right to the access of light and air by their means. The Judge has not found whether the apertures are old or new. If they have been recently made, we think that it follows almost necessarily that they are injurious to the plaintiff. The plaintiff's right (supposing the house to be one used by him and his family as an occasional place of residence, and the place adjacent to the windows to be a place where the female members of the family pass to and fro) must to some extent be affected. It may be that the injury and inconvenience is slight. On the other hand, any infringement of privacy of the description may affect very seriously the comfort and value of a place of residence. Unless the defendant can establish some right from long usage to the apertures, we think that he cannot, merely because the comfort and ventilation of his own building is increased, claim to have them open, and that the burden of erecting a screen to secure the privacy, to which he is already entitled, cannot be imposed on the plaintiff. It is suggested that from the defendant's building, as well as from other points, a view is commanded of the place in question. But even if this be true, the immediate opening, close adjacent to the road, may be a serious injury. Whatever may be the extent of the injury, if the plaintiff has a right to be exempted from this invasion of his privacy, and if the Court is satisfied that privacy is invaded, the plaintiff is entitled to the relief claimed, namely, the closing of the windows. The case is remanded to the Judge for a new trial."

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In *Ram Baksh* v. *Ram Sookh* (1), which was an appeal to this Court from the decree of the Principal Sadr Amin of Moradabad, amending the decree of the City Munsif of Moradabad, the grounds of appeal to which reference is made in the judgment were as follows :—

"1. That the said decision is contrary to the principles of jurisprudence, in that, the plaintiff has no right to put restrictions to defendant's enjoyment of his proprietary rights, to suit the imaginary convenience of the former.

"2. That the said decision is contrary to law, in that, the defendant has a prescriptive right to use the three windows which are in existence for the last 20 years in the same manner as he hitherto did.

"3. That the said decision is contrary to law, in that, the lower appellate Court, having found that the *parda* system does not prevail among the caste to which the parties to the suit belong, should not have ordered any restrictions as to the use of the windows by the defendant."

The judgment of Roberts and Pearson, JJ., delivered in 1868, was as follows :—

"It is contended that the injury alleged to have been caused to the plaintiff by the invasion of his privacy, is a sentimental grievance, rather than a substantial injury, for which relief can be claimed at law. Such a contention may be countenanced by English law ; but the doctrine contended for is scarcely in accordance with the feelings or suited to the habits of the natives of this country, and is not shown to have received judicial sanction from the Indian tribunals. On the contrary, we find that the first Bench of this Court on the 17th June last, in a case No. 742 of 1867, *Gur Dass* v. *Manohar Dass* (2), maintained the opposite view. We are not therefore prepared to allow the first plea in appeal. The second plea in our judgment fails, inasmuch as the lower Courts have not directed the three windows referred to, which have been used by the defendant for more than 20 years, to be entirely closed, but have merely provided that they shall not be used differently

(1) N.-W. P. H. C. 1868, p. 253. (2) N.-W. P. H. C. 1867, p. 269.

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from heretofore, in such a manner as to be prejudicial to the plaintiff's privacy.

"As to the third plea, the remark that the parties to the suit or the members of the caste to which they belong do not observe a strict *parda*, is not sufficient to deprive the plaintiff of the right to object to an innovation by which his comfort and that of his family is affected."

I infer from that judgment that the law in England as to easements had been discussed in the course of the arguments. I am unable to ascertain whether or not the Madras case of *Kamathi* v. *Gurunada Pillai* (1) had been referred to. As I read that judgment, Roberts and Pearson, JJ., had not at the time when it was delivered any doubt of the existence of a right of privacy in this part of India, or that for a substantial interference with such a right, an action could be maintained.

The next case in this Court, so far as I can ascertain, in which the question of a right of privacy arose was *Khuderun Lal* v. *Juggannath Prasad* (2). That was a suit brought in the Court of the Munsif of the city of Jaunpur for permission or a declaration of a right to build in muhalla Mucharhatta in Jaunpur a two storied house, notwithstanding a Magistrate's order which apparently had prohibited the building of the house. I infer from the judgment of the Munsif that the defence was that on the site in question a one-storied house originally stood, but by an alleged usage the plaintiff was not entitled to erect on the site a two-storied house, that the plaintiff was prohibited by an order of a Magistrate from building a two-storied house on the site, and that the two-storied house, if erected, would invade the privacy of the defendant's house. On the question of privacy the Munsif found that "no inconvenience will be caused to the defendant, nor will the female apartments be exposed or the ventilation of his house stopped by the plaintiff's construction of the second story of his house, for it appears from the statement of the plaintiff's witnesses, from the tenor of that of the defendant's witnesses, and also from a local inspection made by myself, that the existing windows of the defendant's house are at a distance from the road

(1) 3 Mad. H. C. R. 141. (2) Unreported, S. A. No. 545 of 1869.

and fields and from the roofs of the one-storied house of the defendant, and also from the other roof of the plaintiff's house and of that of the other persons living in that quarter: so that if the females of the defendant's house will themselves come at the windows, they will of course be seen by all and their privacy destroyed, but if they do not, they will not be seen and their privacy will be preserved."

The Munsif decreed the plaintiff's claim. The District Judge of Jaunpur, on appeal, reversed the decree of the Munsif. The plaintiffs appealed to this Court from the decree of the District Judge. The judgment of the District Judge is not with the record, and I am unable to ascertain what were his reasons for dismissing the suit.

In delivering judgment in the plaintiff's special appeal to this Court, Pearson and Turner, JJ., said:—"We are of opinion that the claim of the defendant is unreasonable. By the raising of the plaintiff's roof as proposed the defendant will not be deprived of light and air. His only complaint is that the plaintiff will be thereby enabled to look through a window, which window lights the women's apartments. But against this the defendant can easily protect himself by a screen or curtain, or if he holds that protection insufficient, it seems not impossible to procure light and air by the opening of a window on either side of the house, which would not be accessible from the plaintiff's roof;" and they decreed the appeal. The judgment of Pearson and Turner, JJ., was delivered on the 19th of July, 1869. I infer from that judgment either that those learned Judges adopted the Munsif's findings of fact, or considered that the erection by the plaintiff of a second story would not cause any material or appreciable interference with the privacy of the female apartments of the defendant. That case does not throw much light on the question. It has not been reported.

In the case of *Joogul Lal* v. *Musammat Jasoda Beebee* (1), in which the plaintiff sought to close a door recently opened by the defendant, the judgment of Morgan, C. J., and Spankie, J.,

(1) H. C. R., N.-W. P., 1871. p. 311.

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delivered in 1871, on appeal from the decree of the District Judge of Allahabad, so far as it is material, was as follows:—

"We think that in no view of the law can the plaintiff be held to be entitled to the relief sought for. Her house is one of several houses ranged (it would seem from the terms of the Munsif's judgment and from the pleader's statement here) on either side of a narrow road or lane. Already it, in the portion of it with which we are concerned, is within range of view from the opposite (that is, the defendant's) side of the way; for one at least of the adjacent houses commands it from the roof. It is said that the defendant has not only so altered or constructed and added to the upper part of his house as to command a view of the plaintiff's apartments, but that he has also made provision in the place newly constructed for persons to sit. No improper obstruction of light or air is stated to be occasioned. The case is really one in which a house-owner in a street, having changed the arrangement or construction of the upper part of his house in a manner otherwise consistent with his joint rights of enjoyment, is sought to be restrained, not by the holder of an adjacent house, but by a neighbour living on the other side of the road, who can allege against the defendant no more substantial cause of suit than this, that the newly-constructed place admits of persons who may temporarily occupy it seeing portions of the interior of the plaintiff's house through his windows. Even if this is so, it is no more than others may admittedly do. There can be no question in such case of loss of privacy. And the mere fact that the alteration gives to the defendant a wider range of vision than before can constitute no legal right of suit in the plaintiff."

That judgment has been cited as an authority for the contention that no right of privacy, for the interference with which a suit could be maintained, exists or can in law exist in this part of India. As I read the judgment, the learned Judges did not in it inferentially or otherwise lay down any such proposition. They were dealing with the facts of the case before them, and if any inference is to be drawn from what they said as to what might be the rights and liabilities of parties under other circumstances, I think it is that where a house does enjoy substantial and real privacy,

a substantial interference with that privacy might afford the owner a good cause of action. In the case before them, these learned Judges apparently found, that there was, owing to the position of the house and the way in which it was overlooked, no privacy to be maintained, and consequently no privacy to be interfered with. If those learned Judges held in 1871 a view of the law different to that which they had expressed in 1867 in their judgment in *Goor Dass* v. *Manohar Dass* (1), I would have expected that they would have referred to their judgment in that case and explained why they no longer considered that case as an authority, and in what respect and for what reasons they considered that the view of the law which they then held was erroneous.

Another unreported case decided by Pearson and Turner, JJ., in 1874, is that of *Musammat Kohla* v. *Purbhoo Dial* (2). In that case the plaintiff sued the defendant for an injunction to compel her to close certain newly-opened windows in her house which interfered with the privacy of the female apartments of the plaintiff's house. As I gather from the judgment in first appeal of the District Judge of Cawnpore, the Munsif of Cawnpore, who tried the suit, following the rulings of the High Court at Calcutta in *Mahomed Abdur Rahim and others* v. *Brija Suhu* (3); *Ramlal* v. *Mahes Baboo* (4); *Sheikh Golam Ali* v. *Kazee Muhammad Zahur Alum* (5), and of this High Court in *Ram Baksh* v. *Ram Sookh* (6); *Kasim Ali Khan* v. *Brij Kishore* (7), and *Joogul Lal* v. *Musammat Jasoda Bebee* (8), dismissed the suit. From that decree the plaintiff appealed to the District Judge of Cawnpore. In the judgment which the District Judge delivered he said:—"One of the pleas adverts to the custom of the country and its particular observance in the town of Cawnpore, where the parties dwell, that no one is allowed to open out doors in newly-erected buildings which will expose the privacy of their neighbours. There is nothing on record to show that the custom prevails in Cawnpore more than any other place in India. The custom is undoubtedly respected and observed throughout this country and indeed among all oriental races, and if it were left to the Court to enforce a custom founded on long

(1) H. C. R. N.-W. P., 1867, p. 269.
(2) Unreported S. A. No. 1090 of 1873.
(3) 5 B. L. R. 676.
(4) Ibid., 677 note.
(5) 6 B. L. R. App. 76.
(6) N.-W. P. H. C. Rep., 1868, p. 253.
(7) N.-W. P. H. C., 1870. 182.
(8) H. C. R., N.-W. P., 1871, p. 311.

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social usage, there would be no difficulty in doing so; but the introduction of principles of English law, and the decisions of superior tribunals founded thereon, made it necessary to abide by the directions laid down therein for guidance. Had the suit been an ordinary one to have the newly-opened windows closed because of the want of privacy caused thereby, there would be no other course than to treat it as a sentimental grievance for which no relief could be granted, the right of privacy having been adjudged to be not of the nature of a legal right."

I infer from the judgment of the District Judge and the judgment of this Court on appeal here that the plaintiff's windows had been then recently opened and his verandah recently constructed. The District Judge of Cawnpore, however, allowed the appeal and decreed the plaintiff's claim on the ground that, as the defendant carried on the business of a prostitute in her house, the opening of the windows in question, would under the circumstance cause a nuisance to the plaintiff. From that decree the defendant brought a special appeal to this Court. On that appeal the judgment of Pearson and Turner, JJ., was as follows:—

"We cannot recognise the ground on which the Judge has considered that, in this case, he is at liberty to depart from what is now the established law, with regard to the opening of windows. The circumstance that the owner of the house opposite to that of the respondent is a courtezan does not deprive her of the ordinary rights of a proprietor. If persons who frequent her house conduct themselves in such a manner as to occasion a public nuisance, proceedings can be taken to put a stop to their misconduct; but so long as they merely look out of the windows of the house, using the windows as any other persons might use them, they cannot be interfered with, although the result may be that they disturb the respondent's privacy. He has, however, his remedy; he may, as has been suggested, block up the windows which he has himself recently opened"; and they allowed the appeal and dismissed the suit.

Those learned Judges cited no authority for the opinion which they expressed as to "what is now the established law with regard to the opening of windows." Pearson, J., had been one of the Judges

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who had delivered judgment in *Ram Baksh v. Ram Sookh* (1), in which it was held that an invasion of privacy by the opening of windows was a substantial injury for which relief could be claimed at law; in which case also the decision of Morgan, C. J., and Spankie, J., in *Goor Dass v. Manohur Dass* (2), was followed apparently with approval. Pearson, J., did not refer to either of those authorities, nor, indeed, to any other authority. It is not apparent from this judgment, whether they considered that such a custom or usage, as the District Judge of Cawnpore stated to exist in Cawnpore, must be bad in law, or that no right of privacy could be acquired, or, if such a right could be acquired, that it had not been acquired under the circumstances of the case, or whether they treated the decree of the District Judge as being solely based on the possibility of those who might use the defendant's house causing a nuisance to the plaintiff.

Another unreported decision of this Court, to which we have been referred, is that in *Saiyid Amjad Ali v. Reyat Husain* (3). In that case, so far as the present question is concerned, all that Stuart, C. J., and Oldfield, J., in 1877, decided was that the plaintiff was not entitled to an injunction compelling the defendant to close certain windows, which had been recently opened by him and which looked into a private lane of the plaintiff's, but did not disturb the privacy of the plaintiff's family within his house. The lane there in question was apparently used merely as a lane or passage.

Another unreported case which has been cited, decided in this Court in 1878, is that of *Lachmi Shankur v. Chet Ram* (4). In that case the Munsif of Moradabad had found that the doors and windows, which the plaintiff sought to have closed up, were old doors and windows, and that the plaintiff had not objected at the time when they were opened or until a dispute had arisen between the plaintiff and the defendant concerning a stair. The Munsif dismissed the suit so far as it related to the closing of the doors and windows. The Subordinate Judge on appeal found that the windows had been recently opened, and decreed the claim of the plaintiff to have them closed. On appeal to this Court, the vakil of the plaintiff must, for some reason which is not stated, have admitted

(1) H. C. R. N.-W. P., 1868, p. 253.
(2) H. C. R., N.-W. P., 1867 p. 260.
(3) Unreported S. A. No. 570 of 1877.
(4) Unreported S. A. No. 60 of 1878.

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that the portion of the Subordinate Judge's decree which ordered the doors and windows to be closed could not be supported. The judgment of this Court on the question as to the closing of the doors and windows does not assist me on the question under consideration. That portion of the judgment is as follows :—"The decree of the lower appellate Court, so far as it orders the closing of the doors and windows, it is admitted, cannot be sustained, and in this respect the decree of the lower appellate Court must be reversed and that of the Munsif restored with costs."

Another unreported case decided in this Court in 1882 is that of *Musammat Begam-ul-nissa* v. *Mahant Hardeo Das* (1). The judgment of Straight and Brodhurst, JJ., so far as it is material to this point, is :—"There is nothing in the judgments of the lower Courts to justify them in interfering with the legal rights of the defendants to open a door in their own wall. This they were fully entitled to do, and the plaintiffs had no cause of action against them." The Munsif of Muttra had found that the door in question was a new one, and that "the house of the defendants is so large that there is no necessity of this new door for the admission of air or light, but it encroaches upon the privacy of the plaintiff's house, and certainly it is a source of inconvenience to him." The Subordinate Judge of Agra, on appeal, adopted so much of the Munsif's judgment as found that the door had been recently opened and was an inconvenience to the plaintiff. He did not find whether or not the opening of the door had interfered with the privacy of the female portion of the plaintiff's house, and on this point the finding of the Munsif was of the vaguest description. Neither the Munsif nor the Subordinate Judge found in what way the opening of the door would cause inconvenience to the plaintiff or to what extent such inconvenience would be caused.

I think the judgments of Straight and Mahmood, JJ., when they made the order of remand in *Mata Prasad* v. *Behari Lal*, (2) show that they considered, that in these Provinces at least, a material interference by the opening of windows with the privacy of the premises occupied by the females of a neighbour, might afford that neighbour, a good cause of action. In that

(1) Unreported S. A. No. 1476 of 1881. (2) Unreported S. A. No. 8 of 1886.

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case, my learned brothers, considering that the District Judge had not on the appeal to him really tried the case, remanded the case under section 562 of the Code of Civil Procedure for a trial on the merits. My brother Straight in delivering his judgment said:—"Upon the statements of the plaintiff and upon the answers made by the defendants, the substantial issue to be tried between the parties was, whether there had been by the act of which the plaintiff complained on the parts of the defendants an interference with the privacy of the plaintiff: and in order to arrive at a conclusion upon that point, it was essential for the Courts below, very specifically to find in what way and in respect of what right of privacy the defendants had interfered with the plaintiff's right. Upon a clear and distinct finding in respect of that point, then, the question of law would properly have arisen and could have been properly argued, namely, whether, looking to the findings of fact, such a right subsisted in the plaintiff at the time the wrongful act was alleged to have been done, that the plaintiff had a right to maintain the suit and had a cause of action to maintain the same." In that case I infer from the judgment of the Munsif of Allahabad that the plaintiff alleged in his plaint that the defendants, with the object of depriving the plaintiff of the privacy of his house situate in muhalla Pan Dariba in the city of Allahabad, had recently, and contrary to the old custom and usage prevailing in parts inhabited by respectable persons, opened these doors from a room in his house on to a terrace.

In the case of *Lachman Prasad* v. *Jamna Prasad* (1) the plaintiffs, according to the judgment of the Munsif of Cawnpore, who tried the suit in the first instance, alleged that the defendant in rebuilding his house had opened a door in the western wall of his house in the second story, by reason of which there had been an invasion of the privacy of the plaintiffs, and claimed to have the door closed. The Munsif in his judgment said:—"It has been repeatedly held by the Honourable High Courts that a suit cannot be maintained to oblige the defendant to close doors recently opened in his house on the ground that they overlooked the *zenana* of the plaintiff—vide *Mahomed Abdur Rahim* v. *Brija Sahu* (2), *Sheikh*

(1) Weekly Notes, 1887, p. 295. (2) 5 B. L. R. p. 676.

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Golam Ali v. *Kazi Mahomed Zahur Alum* (1), *Jogul Lal* v. *Musammat Jasoda Bebee* (2). The issue is accordingly decided against the plaintiffs."

The Subordinate Judge of Cawnpore on appeal said:—"I hold that although the door affects the privacy of the plaintiff's house, yet as the defendant has set it up in his own wall, the plaintiffs have no right to have it closed. The remedy is in the hands of the plaintiffs. They can raise their wall so high that the door may not affect their privacy." The case came up on appeal to this Court. There were cross objections. On the 25th May, 1886, Oldfield and Mahmood, JJ., remitted an issue to the Subordinate Judge for a finding, as to how and to what extent, the door affected the privacy of the plaintiffs. The Subordinate Judge on the remand found that the window in dispute overlooked the whole of the plaintiff's house, and in particular those portions which were reserved for females. Upon the return of this finding the defendant filed objections under section 567 of the Code of Civil Procedure, to the effect that the plaintiffs were not entitled to restrain him from opening and using his window on the ground of interference with their privacy in the absence of proof of twenty years' uninterrupted user. The case came on to be heard, on the return to the order of the remand, before Oldfield and Brodhurst, JJ., and they ordered a further remand, saying, "We think it desirable that an issue be tried whether by local custom, there is any right of easement, by which the plaintiffs have a right to have the privacy of their apartments maintained by the removal of the door and window." The Subordinate Judge on that further remand found that the existence in the mohalla where the parties lived of a customary easement of privacy was proved. On the return to that last remand, as Oldfield, J., had retired from the Bench, the case came before my brother Brodhurst and myself to be disposed of. In my judgment I said that "the findings on remand show that the plaintiff is entitled to have his right of privacy observed and to have a mandatory order to compel the appellant to permanently close the door or window complained of;" and my brother Brodhurst agreeing with my view of the law, we decreed accordingly.

(1) 6 B. L. R. App. 76. (2) N.-W. P. H. C. R., 1870, p. 311.

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I now come to the cases relating to rights of privacy, decided by the High Court at Calcutta. In *Sreenath Dutt* v. *Nand Kishore Bose* (1) on appeal from the decree of the Judge of Hooghly, Bayley and Shumbhunath, JJ., in 1866, in their judgment say:—"We further notice that the plaintiff is said to have built an upper story to his house, overlooking the inner apartments of the defendant. Defendant on this built the wall which it is said has deprived the plaintiff of light and air. Even if it were shown that the light and air had long been enjoyed by the plaintiff and have now been cut of by the defendant's wall, still, as plaintiff had no right to build an upper story, with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the defendant's family, the plaintiff would have no relief in this respect, as he was the first and greater wrong-doer."

Those learned Judges could at that time have had no doubt that a right of privacy existed.

The next reported case in which the question as to a right of privacy arose which came before the High Court at Calcutta, so far as I have been able to ascertain, was that of *Mahomed Abdur Rahim* v. *Birju Sahu* (2). In the arguments and in the judgment in that case, amongst others, some unreported cases decided at Calcutta are referred to. In that case the Subordinate Judge on appeal had held that, according to the usage of this country, if the privacy of any house occupied by *parda-nashin* women be intruded upon, the parties thus injured could lay claim to the removal of such injury, and passed a decree ordering the windows complained of to be closed, and the defendant's verandah to be so screened as to prevent an exposure of the female apartments, and that in default thereof the verandah should be demolished. Judgment was delivered by Markby, J., Bayley, J., concurring.

The most important point which struck me on reading that judgment is that those learned Judges in deciding the appeal, which was a second appeal, either overlooked or ignored the finding of the Subordinate Judge as to the usage of the country, and decided the appeal as if no such usage or custom of privacy had been found. They considered that a right of privacy could

(1) 5. W. R. 208. (2) 5 B. L. R., 676 S. C. 14 W. R. 103.

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not be an inherent right of property in this country, and they allowed the defendant's appeal and dismissed the suit. I cannot ascertain from the judgment whether or not those learned Judges considered that there could be no valid custom of privacy in this country. They pass by the two Bombay cases, *Manishankar Hargovan* v. *Trikam Narsi* (1) and *Kuvarji Premchand* v. *Bai Javer* (2), with the observation that in those cases the right of privacy had been maintained on the express ground of a local usage in Guzerat. They also said: "It is remarkable that in the cases in which the right is upheld nothing is said of gaining by prescription a right to prevent your neighbour from building his house so as to overlook your premises, but the right of privacy is spoken of as if it was an inherent right of property, and the invasion of privacy is spoken of as something like a trespass. And in the present case the Subordinate Judge considers that intrusion on the privacy of the female apartments is an injury which the law will prevent." They apparently overlooked the fact that in an unreported case decided by Kemp and Seton-Karr, JJ., two Judges of the High Court at Calcutta, to which they in this judgment refer, Kemp and Seton-Karr, JJ., had said: "Both the Judges of the lower Courts have visited the spot and have satisfied themselves that the opening of the windows complained of is a violation of the privacy to which the plaintiff has a right. There is nothing contrary to the law in this finding, *and it is certainly in conformity to the usage of the country.*" I do not know whether or not that judicial statement of Kemp and Seton-Karr, JJ., was founded on the findings of fact or the admission of the parties in the case before them, or upon a well-recognised custom of which they took judicial notice. Markby and Bayley, JJ., expressly did not dissent from the decision of Bayley and Shumbhunath, JJ., in *Srinath Dutt* v. *Nand Kishore Bose* (3). In fact, in reference to that case Markby, J., said: "I think that the opening of new windows affecting a neighbour's privacy may very possibly give him a right, according to the usage of the country, of protecting his privacy by any erection which he chooses to put upon his own land; and that a person who has opened these new windows cannot complain that

(1) 5 Bomb. H. C. Rep. 42. (2) 6 Bomb. H. C. Rep. 143.
(3) 5 W. R. 208.

such erection interferes with his light and air." The proposition of law from which Markby and Bayley, JJ., were not prepared to dissent was this:—"The defendant, on this, built the wall which, it is said, deprived plaintiff of light and air. Even if it were shown that light and air had long been enjoyed by the plaintiff, and have now been cut off by the defendant's wall, still, as plaintiff had no right to build an upper story, with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the defendant's family, the plaintiff would have no relief in this respect, *as he was the first and greater wrong-doer.*" The plaintiff in that case could not have been treated as a wrong-doer, if the defendant had no right the violation of which constituted a wrong. It is not easy to understand how Bayley, Shumbhunath, and Markby, JJ., could have thought that the commission of a wrong by the plaintiff in that case excused the commission of another and a distinct and different wrong by the defendant, unless those learned Judges were of opinion that the principle of the plea of *son assault demesne* to an action of assault applied to the case before them. Markby and Bayley, JJ., in the case the decision in which I am now considering, appear to have thought that there can be no inherent right of property the interference with which would be an actionable wrong, unless such interference were a trespass. They apparently overlooked the existence of inherent rights of property known, at least, to the law of England, as for instance, the right of lateral support for adjoining land.

The judgment delivered by Markby, J., and concurred in by Bayley, J., to which I am referring at present, and the judgments in some other cases, apparently suggested a distinction between the legal effect of a general custom and that of a purely local custom. As I understand the judgments, in some of the cases it has been assumed that although a general custom of the country or of the province as to privacy has been found or judicially declared, such general custom is not to be given effect to, whilst a local custom of privacy may be treated as establishing the right. It appears to me that a general custom of the country or of a province ought to have as much effect as a local custom, unless the local custom curtails or extends the general custom which prevails over the larger area of which the smaller area of the local custom is a portion. I

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have always understood that the common law of England was, or was considered to be, founded upon the common custom of the realm, if it was not in fact the common custom of the realm judicially declared. The custom of Guzerat as to privacy, so far as I have been able to ascertain, appears to be applicable to all the towns in Guzerat and not to those towns only in Guzerat in which a local custom of privacy has been found to exist.

The next reported decision of the High Court at Calcutta on this subject which I have found is that of *Sheikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (1) decided in 1870. It does not appear from the report of that case whether or not any custom of privacy had been found by the lower Courts. The judgment of Jackson, J., in that case was apparently based partly on a judgment delivered by himself and Steer, J., in an unreported case decided by them on the 18th June, 1862, in which they said: "We are not aware that where two owners of houses live contiguous, but separated by an intervening space, the custom of the country requires that neither party shall make any improvement on his property, if such improvement has the effect of depriving the other of a certain degree of privacy. We should rather say that when the one opens a window which overlooks the other, it is the custom of the country that the other raises a screen or adopts some other contrivance to counteract the effect of the opening made in his neighbour's house." This quotation I have taken from the judgment of Markby, J., in *Mahomed Abdur Rahim* v. *Birju Sahu* (2). Jackson, J., in that unreported case did not say that if a custom of privacy was established, a substantial interference with that right would not give a cause of action. Jackson, J., in his judgment in the case of *Sheikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (1), also relied upon the view of the law expressed by Markby, J., in *Mahomed Abdur Rahim* (2) and stated that he adhered to the view of the law expressed by Markby, J., in that case. Consequently my comments on that case apply to the judgment of Jackson, J., in *Sheikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (1). The judgment of Glover, J., in *Sheikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (1) was as follows:—"I concur. Privacy is not an inherent right of property like a right to ancient lights and air. In this case, more-

(1) 6 B. L. R. App. 76. (2) 5 B. L. R. 676.

over, the houses of plaintiff and defendant are separated by a public road and by the house of a third party." As to this judgment, it is only necessary to observe that he differentiated the right of privacy claimed from a right to ancient lights and air, on the ground, that the latter was an inherent right of property. So far as I am aware, a right to light and air is a right which can only be acquired by grant, prescription, or estoppel : it may certainly be reserved, but it is not in any sense an inherent right of property. If a right of privacy can be acquired, I fail to see how the fact that a public road and the house of a third party intervenes between the house of a plaintiff and defendant can prevent a plaintiff having or acquiring in respect of his house as against a defendant a right of privacy.

The next reported case decided by the High Court at Calcutta on this subject is that of *Kalee Pershad Shaha* v. *Ram Pershad Shaha* (1) decided in 1872. In that case, Glover, J., in delivering the judgment of the Court (Kemp and Glover, JJ.), said :—" At the same time we agree with the Subordinate Judge in thinking that the right of privacy is not an inherent right; and that if it exists at all, it must be shown to exist by some local usage, by special permission, or by grant, and in this case there is no such local usage, permission, or grant proved ; and the decision in the case of *Mahomed Abdur Rahim* v. *Birju Sahu* (2) lays down what we consider to be the right view of the law in deciding questions of this sort ; and following that decision, we must uphold the judgment of the Subordinate Judge." That case as reported in 14 Weekly Reporter 103, merely gives the judgment. If the attention of Kemp and Glover, JJ., had been drawn to the report of that case in the 5 Bengal Law Report, they would have found it stated at p. 677 that " on appeal, the Subordinate Judge held that the females of the plaintiff's family were *parda-nashin* women; and that, according to the usage of this country, if the privacy of any houses occupied by *parda-nashin* women be intruded upon, the parties thus injured could lay claim to the removal of such injury." Further, Kemp, J., was one of the two Judges (Kemp and Seton-Karr, JJ.) who, on the 10th of August, 1865, had held that " the opening of the windows complained of is a violation of the privacy to which the plaintiff has a

(1) 18 W. R. 14. (2) 5 B. L. R. 676.

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right. There is nothing contrary to law in this finding, and *it is certainly in conformity to the usage of the country.*" Kemp, J., did not explain what it was which had caused him to alter his opinion between 1865 and 1872. In the decision which he in 1872 relied upon and followed, the Judges had overlooked or ignored a similar finding by the Subordinate Judge. I infer from the judgment of Kemp and Glover, JJ., in *Kalee Pershad Shaha* v. *Ram Pershad Shaha* (1) that they did not consider that a right of privacy could be acquired by prescription, although they considered that it might be acquired by a local usage, by a special permission, or by grant. If such a local usage was valid, I cannot see why the usage of the country "or the usage of this country" to the same effect should not be valid.

The only reported decision on the question of a right of privacy of the Courts at Madras of which I am aware is that of *Kamathi* v. *Gurunada Pillai* (2), which was decided on the 30th of June, 1866 by Holloway and Innes, JJ. Those learned Judges, applying the law of Westminster Hall and the House of Lords, dealing with a case of the rights of parties in England, and ignoring the decisions of the Courts in India on the subject, held that there is in India no right of privacy, the interference with which, is a wrong, for which a remedy is given. It does not, however, appear from the report of that case that the right of privacy was claimed by reason of any custom, grant, prescription, acquiescence, or estoppel; but I think it may be inferred from the judgments in that case that those learned Judges would have held that no such right could be acquired by custom, prescription, or otherwise. It was correctly said by Markby, J., in his judgment in *Mahomed Abdur Rahim* v. *Birju Sahu*, (3) that "in *Kamathi* v. *Gurunada Pillai* (2) the Madras High Court held that there was no right of privacy, but the question, for reasons which do not appear upon the face of the judgment, was discussed with reference to European and not with reference to Hindu or Muhammadan law." He might have added that it was decided not according to European law, but according to the law of England. For all that, it appears to me that that decision of the Madras High Court may have had a considerable influence

(1) 18 W. R. 14. (2) Mad. H. C. R. 141.
(3) 5 B. L. R. 676.

on those Judges who subsequently held that a right of privacy did not exist in India.

The usage of Guzerat relating to the right of privacy which the Bombay Courts held to be established and to be valid was by Tucker and Gibbs, JJ., in 1867, in *Manishankar Hargovan* v. *Trikam Narsi* (1), stated thus: "A series of decisions extending over a long number of years have settled the question that, in accordance with the usage of Guzerat, a man may not open new doors and windows in his house, or make any new apertures, or enlarge old ones, in a way which shall enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation, and in this manner to intrude upon that neighbour's privacy; and that an invasion of privacy is an infraction of a right, for which the person injured has a remedy at law." Tucker and Gibbs, JJ., declined to follow the decision of the Madras High Court in *Kamathi* v. *Gurunada Pillai* (2).

In *Kuvarji Premchand and others* v. *Bai Javer* (3) decided in 1869, Warden and Lloyd, JJ., say: "We see no cause to interfere with the decision of the lower Court that the privacy of the plaintiff is invaded by the newly-opened windows. The existence of a public road between the houses makes no difference according to the custom of Guzerat."

All that was decided by Melvill and Kemball, JJ., in 1871, in *Keshav Harkha* v. *Ganpat Hirachand* (4), was that the opening by the defendant of a window which looked, not into the plaintiff's private apartments, but into an open courtyard outside his house, was not an invasion of the plaintiff's privacy which would entitle him to have the window closed.

In the case of *Shrinivas Udpirav* v. *Reid and others* (5) decided in 1872, the plaintiff, whose house was in Dharwar, had been prevented by a Magistrate's order from opening a window in a wall of his house. The Acting Judge of Dharwar found on the evidence that it was the custom in Dharwar that a person could not make a new aperture, which might invade the privacy of his neighbour, without his permission, and that, as a matter of fact, the plaintiff

(1) 5 Bomb. H. C. R., A. C. J. 42.
(2) 3 Mad. H. C. R. 141.
(3) 6 Bomb. H. C. R., A. C. J. 143.
(4) 8 Bom. H. C. R., A. C. J. 87.
(5) 9 Bomb. H. C. R., A. C. J. 266.

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making an opening in his wall would expose to view the women of the household of one of the defendants when they bathed at a well in the compound. The case came up in first appeal before Gibbs and Lloyd, JJ. Their judgment, so far as it is material to the point under consideration, was as follows :—"It may be taken to have been correctly found by the Judge that the window complained of would, to a certain extent, make the third defendant's compound less private than heretofore, but it is within the power of the defendant to adopt some arrangement by which the inconvenience arising therefrom, if any, may be avoided; and it is more reasonable that the defendant should protect himself, than that the plaintiff should be deterred from improving his own house, for, as was observed by Mr. Justice Markby in the case reported at p. 676 of 5 B. L. R., 'to hold that privacy is a right and the invasion of it an injury would lead, as it appears to me, to the most alarming consequences to the owners of house-property in towns.' It has been recently held by this Court (S. A. Nos. 307 of 1871 and 339 of 1871) that the mere opening of a door in a person's own premises does not constitute a cause of action, and after consulting all the authorities that have been referred to, we think, unless we can coincide with the Judge that the local custom has been established, the plaintiff should succeed. With reference to this alleged custom, it must be observed that it was not set up in the written statement, and though certain witnesses depose to the effect that it was not customary to allow doors and windows to be opened without permission, if the privacy of neighbours is thereby interfered with, it appears to us that their evidence is too vague, and that to establish the point it should be shown that the custom was approved or immemorial, or that it had been judicially recognised. The various decisions quoted by the Judge refer solely to a custom prevailing in Guzerat, and this Court, as has been said, would be very unwilling to extend this exceptional privilege without the most satisfactory proof that it prevailed elsewhere." The authorities which had been referred to in the arguments in that case were *Gibbon* v. *Abdur Rahman* (1); *Mahomed Abdur Rahim* v. *Birju Sahu* (2); *Komathi* v. *Gurunada*

(1) 3 B. L. R. 411. (2) 5 B. L. R. 676.

Pillai (1), two unreported judgments of Melvill and Kemball, JJ. ; *Kuvarji* v. *Bai Javer* (2) and *Mani Shankar* v. *Trikam Narsi* (3). Gibbs and Lloyd, JJ., apparently considered that a custom of privacy, if proved, would be valid.

In *Gibbon* v. *Abdur Rahman* (4) no question of privacy appears to have arisen. The females, if any, of the plaintiff's family, judging by his name, were not likely to have been *parda-nashin* women. It was an anticipated trespass, not an interference with a right of privacy of which the plaintiff complained.

Owing to the copies of the Punjab Record for 1869 and 1876 not being in the Library of this Court, I have been unable to examine the decisions of the Chief Court of the Punjab, 21 and 91 of Punjab Record, 1869, and 90 of Punjab Record, 1876, in which Sir Meredyth Plowden in his judgment in *Yasin* v. *Gokal Chand*, No. 19 of 17, Punjab Record, civil judgments 72, states that the right of privacy has "beyond doubt been acknowledged." I shall give two short extracts from that judgment. At page 72 Sir Meredyth Plowden says ;—

"The object of this suit is to compel the defendant to build a screen on the top of the upper story recently added to his house, so that persons using the roof of the latter shall not command a view of the interior of the plaintiff's premises." And at page 73 he says :—"When, therefore, a suit is brought to restrain the owner of a house from adding an upper story to his own house, or to compel him to make some addition for the protection of the plaintiff's privacy, it is only just to demand from the plaintiff strict proof, first, that the custom of domestic privacy is observed among that section of society of which he is a member, and in his own household ; and secondly, that the domestic privacy of individuals is generally regarded among the community of the locality where the plaintiff resides, as being of so much importance that by common consent it is considered incumbent upon owners of land and houses either to abstain from elevating their houses, or to elevate them with precautions against the violation of such privacy." And further on he says :—"This right when it exists is in its nature an easement, but I am not aware that any attempt has yet been

(1) 3 Mad. H. C. R. 141.
(2) 6 Bomb. H. C. R., A. C. J. 143.
(3) 5 Bomb. H. C. R., A. C. J. 42.
(4) 3 B. L. R., A. C. J. 411.

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made to define or describe it. Being founded upon local usage, it seems to me that the Courts are fully justified in demanding that the proof of the customary right shall extend to and include proof of the customary mode of recognition."

In that case Plowden and Brandreth, JJ., dismissed the plaintiff's appeal, being of opinion that the plaintiffs had failed to prove a custom in Basti Ghuzan, where the houses were, by which a proprietor was compelled to build a screen or desist from building. I infer from their judgments that in their opinion such a custom might be proved, or, if proved, would be good in law.

The decisions of the Judges of the High Court at Calcutta on the question as to whether any right of privacy exists or can exist by custom or otherwise, or at all, are conflicting; but I think it may be inferred from some of those decisions that where a custom of privacy has been clearly proved, any substantial interference with it would be an actionable wrong, provided of course that such interference was not by the consent or acquiescence of the party complaining.

The solitary decision of which I am aware of the High Court at Madras on the question of privacy apparently ignores the possibility in law of a right of privacy existing in India.

The High Court at Bombay has clearly recognised and given effect to the custom in Guzerat by which a right of privacy is enjoyed where that custom prevails.

The High Court at Bombay, in *Shrinivas Udpirav* v. *Reid and others* (1) recognised the possibility in law of a custom similar to that of Guzerat existing elsewhere, and in *Mani Shankar Hargovan* v. *Trikam Narsi and others* (2) refused to consider the decision of the High Court at Madras in *Kamathi* v. *Gurunada Pillai* (3) as an authority which could be followed, where, by the usage of the district, a right of privacy exists.

The Chief Court of the Punjab has acknowledged that a custom of privacy can exist and can be enforced.

I have consulted all the reports available to me of the cases in the High Courts at Calcutta, Madras, and Bombay, and of the

(1) 9 Bomb. H. C. R. 266. (2) 5 Bomb. H. C. R., A. C. J. 42.
(3) 3 Mad. H. C. R. 141.

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Chief Court of the Punjab of which I am aware, which deal with the question of a right of privacy. Owing to the absence from our Library of the reports which contain the series of decisions referred to by the High Court at Bombay in *Mani Shankar Hargovan* v. *Trikan Narsi* (1) as having settled the question as to the usage of Guzerat, I have been unable to ascertain whether that custom was first established by a finding of fact on evidence given in Court, or whether it was a well-known and immemorial custom of which the Judges of the High Court at Bombay or their predecessors took judicial notice.

Shortly put, the decisions of the Sadr Diwani Adalat of the North-Western Provinces and of this High Court where the question of the right of privacy has arisen may be summarized as follows:—

In 1855, in a Delhi case, Begbie, Smith and Jackson, JJ., recognised the existence of a right of privacy.

In 1862, in an Allahabad case, Ross and Roberts, JJ., did not suggest any doubt that a right of privacy could exist.

In 1867, in a Benares case, Morgan, C. J., and Spankie, J., expressly recognised the existence of a right of privacy.

In 1868, in a Moradabad case, Roberts and Pearson, JJ., expressly recognised the existence of a right of privacy.

In 1869, in a Jaunpur case, Pearson and Turner, JJ., either adopted the finding of the Munsif that there would be no interference with the privacy claimed, or they may have thought that there would be no material interference. They did not expressly hold that there could be no right of privacy.

In 1871, in an Allahabad case, Morgan, C. J., and Spankie, J., decided the appeal apparently on the ground that there was in that case no privacy to be interfered with, and not on the ground that no right of privacy could exist.

In 1874, in a Cawnpore case, in which the District Judge of Cawnpore had in his judgment stated that the custom of the country recognised a right of privacy, Pearson and Turner, JJ., either

(1) 5 Bomb., H.C. R. A. C. J. 42.

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ignored that finding or treated it as a finding of a custom which could not exist in law.

In 1877, Stuart, C. J., and Oldfield, J., merely decided that the right of privacy claimed in respect of a lane did not exist. They did not suggest that no right of privacy could exist in these Provinces.

In 1878, in a Moradabad case, the claim of privacy was on appeal abandoned for some reason which is not stated.

In 1882, in an Agra case, Straight and Brodhurst, JJ., apparently considered that a right of privacy might exist, but that the facts found did not show how any such right was interfered with.

In S. A. No. 8 of 1886, Straight and Mahmood, JJ., evidently considered that a right of privacy could exist in respect of a house in the city of Allahabad.

In a Cawnpore case, *Lachman Prasad* v. *Jamna Prasad* (1), Oldfield and Mahmood, JJ., when making the first order of remand, evidently considered that a right of privacy could exist; and Oldfield and Brodhurst, JJ., when making the second order of remand, must have considered that such a right could exist by custom. On the second remand, the Subordinate Judge of Cawnpore found that such a custom was proved, and on that finding Brodhurst, J., and I decreed the relief asked for.

Owing to the destruction of records during the Mutiny of 1857 I am unable to ascertain whether the existence of a custom of privacy in this part of India had ever been proved or called in question prior to 1855; and owing to the same cause and to the absence from the report of the case of *Nuth Mull* v. *Zuka-oollah Beg and Kureem-oollah Beg* (2) of information on the point, I am unable to ascertain whether the Judges of the Sadr Diwani Adalat of the North-Western Provinces were in that case following the law as they found it existing, or were deciding that case on facts found.

With the exception of the Jaunpure case in 1869 and the Cawnpore case in 1874, which were decided by Pearson and Turner, JJ., I have not found any case in which any Judge of the

(1) Weekly notes, 1887 p. 295. (2) S. D. A. N.-W. P. 1855, p. 92.

Sadr Diwani Adalat of the North-Western Provinces or this Court has expressed any opinion from which even an inference could be drawn that he considered that a right of privacy could not exist in law, or could not be obtained by custom; indeed, with the exception of those two cases, the inference has been the other way. It is a matter worthy of notice that the finding of the District Judge of Cawnpore as to a custom of privacy which Pearson and Turner, JJ., in 1874, either overlooked, ignored, or treated as a finding of a custom which could not exist in law, has been supported by the finding of the Subordinate Judge of Cawnpore in *Lachman Prasad* v. *Jumna Prasad* (1). If Pearson and Turner, JJ., in the cases decided by them in 1869 and 1874, meant to decide that there could be no custom and no right of privacy in these Provinces, they neither discussed nor referred to any authorities on the subject as I would have expected them to have done, having regard to the previous decisions on that point.

In my opinion, the fact that there is no such custom of privacy known to the law of England can have no bearing on the question whether there can be in India an usage or custom of privacy valid in law. The conditions of domestic life in the two countries have from remote times been essentially different, and in my opinion, it is owing to that difference in the conditions of domestic life alone that a custom which appears to me to be a perfectly reasonable one in India should be unknown in England. In India, or at any rate in these Provinces, the custom of the *parda* has for centuries been strictly observed by all Hindus except those of the lowest castes, and by all Muhammadans except the poorest. It cannot be doubted that the male relations of a *parda-nashin* woman and the woman herself would consider it a disgrace were her face to be exposed to the gaze of male strangers, and whilst that is the view of those amongst whom the custom of the *parda* prevails, I think it is more reasonable that a neighbour should not be allowed to erect new buildings or to open or extend doors or windows in old buildings in such a way as would substantially interfere with those parts of his neighbour's house or premises which are used by *parda-nashin* women of the latter's family than to hold

(1) Weekly notes, 1887 p. 205.

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that the latter's only remedy is to build a wall on his own land, which, although it would maintain his privacy, might deprive his house of light and air and render it uninhabitable, or to screen his windows with probably the same result. We know as a matter of common knowledge that in these Provinces great numbers of *parda-nashin* women in the hot weather are, I may say, compelled from the severity of the climate to sleep in the open air, that is, either in the courtyards or the verandahs of their houses. In such cases, where the privacy in fact exists and is or has been enjoyed, I can see nothing unreasonable in a custom that such privacy shall be protected.

I cannot see that by holding that a right of privacy may exist any such alarming consequences to the owners of house property in towns as apparently influenced the mind of Markby, J., in *Mahomed Abdur Rahim* v. *Birju Sahu* (1) will ensue. Every case must depend on its own facts. A primary question must in all cases be:—Does the privacy in fact and substantially exist and has it been and is it in fact enjoyed? If it were found that no privacy substantially exists or is enjoyed, there would be no further question in an ordinary case to decide. If, on the other hand, it were found that privacy did substantially exist and was enjoyed, the next question would be:—Was that privacy substantially or materially interfered with by acts of the defendant done without the consent or acquiescence of the person seeking relief against those acts? In the case of old buildings, what can an owner of one of the old buildings have to complain of, if a usage or custom exists, by which he cannot so alter his old building, as to deprive his neighbour's old building, of the privacy which has been enjoyed, and make it unavailable as a *senana*, or, in other words, deprive it of all residential value and in this way depreciate its market value? Such a custom where it exists in India is merely an application of the maxims "*Sic utere tuo ut alienum non laedas*" and "*Ædificare in tuo proprio solo non licet quod alteri noceat.*"

I do not suggest that these maxims would, in a case like this, be applicable in England, where no such right of privacy is known to the law. In the case of a building for *parda* purposes newly erected,

(1) 5 B. L. R. App. 670.

without the acquiescence of the owner of an adjacent building site, it appears to me, that a custom which would prevent the owner of such an adjacent site from building so as to interfere with the privacy of the first new building, would be an unreasonable, and consequently, a bad custom in law. If, however, the owner of such an adjacent building site, were without protest or notice, to allow his neighbour to erect, and consequently to incur expenses in erecting buildings or premises for the use of *parda-nashin* women, I think a custom which would prevent him subsequently interfering with the privacy of such new building, would not be unreasonable in this country.

Having given the best consideration which I can to this question, I am of opinion that such a right of privacy as that to which I have already referred exists, and has existed in these Provinces, apparently by usage, or, to use another word, by custom, and that substantial interference with such a right of privacy where it exists, if the interference be without the consent of the owner of the dominant tenement, affords such owner a good cause of action.

In the present case, the defendant in her deposition distinctly admitted that the southern doors of her newly-erected house, and consequently her verandah, overlooked and intruded upon the privacy of the female apartments of the plaintiff's house. After that admission her vakíl decided to call no further witnesses on her behalf. It was contended before us by the defendant's vakíl that as the other portions of the plaintiff's house and part of the courtyard of his house were overlooked from the houses of other people, there could be no substantial interference with any privacy of the plaintiff's house. If the facts on which that contention is founded exist, then it appears to me that the doors and the verandah of the defendant's house, which interfere with the privacy which the defendant has admitted that the plaintiff's premises have enjoyed, must materially interfere with such privacy as has existed, and that the result of allowing that contention to be valid would be to deprive the plaintiff's house of all privacy.

I am of opinion that this appeal should be allowed with costs; the decree of the District Judge set aside with costs, and the decree of the Munsif restored.

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MAHMOOD, J.—The learned Chief Justice has fully and exhaustively dealt with the difficulties which arise in this case owing to the conflicting nature of the case-law, and I agree with him so fully that it is not necessary for me to deliver a separate judgment. But as a native of India myself, I may without hesitation say that in the territories subject to the jurisdiction of this Court the *parda* system prevails alike among Hindus and Muhammadans, and that both these sections of the community by immemorial usage and custom, regard invasion of privacy as actionable. Indeed, if we were to hold any view other than that which the learned Chief Justice has expounded, we should really be reducing even the market value of thousands of houses inhabited by the female portion of the population, if not also the value of houses used by male members of the Hindu and the Muhammadan population of these Provinces. There is no statute-law applicable to these Provinces to govern the decision of a case such as this, and I fully concur with the learned Chief Justice in his opinion that the importation of the English law, as to the invasion of privacy being unactionable, is not only not justified, but positively opposed to the customs, habits, and conditions of life of the populations living under the jurisdiction of this Court. Even in Europe, countries whose principles of law are derived from or founded on the civil law, recognise invasion of privacy as an actionable wrong, a doctrine which no doubt owes its origin to the conditions of life in those countries, regulated as their conditions must necessarily be by the climate and the social and religious habits of the population.

The *parda* system which in India is based both on religious and social notions may have its faults; but Judges take facts as they are, and we, sitting here as Judges with a duty to adjudicate upon such disputes, must take cognizance of those facts and administer justice between the parties.

The learned Chief Justice has pointed out that under conditions of life, such as they are in these provinces, the custom that invasion of privacy is actionable is far from being an unreasonable custom, and the custom itself is so well recognised, that Mr. *Moti Lal* for the respondent in the course of his argument stated that it

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was wholly unnecessary to remand the case for ascertaining the custom.

I concur in all the views to which the learned Chief Justice has given expression. I have no doubt that those views will be greeted by the entire Hindu and Muhammadan population of these Provinces; and I hope that his Lordship's exhaustive judgment will place the law, as administered by this Court, upon a firm and ascertainable footing, rendering ineffective the rulings to the contrary, which have unfortunately done much to disturb the comfort of neighbours in towns, and have, I am afraid, encouraged unnecessary invasion of the immemorial right of privacy, and consequent litigation.

Appeal decreed.

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January 30.

Before Mr. Justice Mahmood.

KASSA MAL (DEFENDANT) v. GOPI (PLAINTIFF) *

Execution of decree—Stay of execution pending suit between decree-holder and judgment-debtor—Appeal from order staying execution—Civil Procedure Code, s. 243—"Such Court"—Civil Procedure Code, ss. 235 (d), 581, 583.

An appeal lies from an order passed under s. 243 of the Civil Procedure Code staying execution of a decree pending a suit between the decree-holder and judgment-debtor.

The words "such Court" in s. 243 of the Civil Procedure Code do not limit the exercise of the powers given by that section only to decrees passed by the Court in which the suit is pending, but with reference to ss. 235 (*d*), 581 and 583 that Court is empowered to stay execution of decrees transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of appeal.

The plaintiff instituted a suit against defendant for recovery of money and other reliefs which was ultimately dismissed in appeal by the High Court, and he was ordered to pay defendant Rs. 1,000 as cost of the litigation. Plaintiff then brought this suit against defendant in the Court of the Subordinate Judge of Farukhabad, and while it was pending defendant applied to the Court to execute his decree for costs. Plaintiff then applied for stay of the execution, and his application was refused by the first Court but granted by the District Court. On appeal by defendant to the High Court *held* that an appeal lies from the order, and the Judge's order was correct.

Miltun Bibi v. *Buzloor Khan* (1) disapproved.

* Second Appeal, No. 865 of 1887, from a decree of W. H. Hudson, Esq., District Judge of Farukhabad, dated the 16th April, 1887, reversing a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Farukhabad, dated the 26th January, 1887.

(1) 8 W. R. 392.

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THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Kashi Prasad* and Babu *Jogindro Nath*, for the respondent.

MAHMOOD, J.—The facts necessary for the disposal of this appeal are the following:—A suit was instituted by Musammat Gopi, plaintiff-respondent, judgment-debtor, for recovery of money and other reliefs of a cognate character to which I need not refer. The suit was finally dismissed in appeal by this Court on the 27th November, 1886, by which decree a sum of about Rs. 1,000 was found due by the said Musammat Gopi to Kassa Mal, the decree-holder, appellant, before me.

Thereupon, it is admitted before me by Pandit *Sundar Lal* on the one hand and Mr. *Kashi Prasad* on the other, that a suit was instituted by the aforesaid Musammat Gopi against the aforesaid Kassa Mal in the Court of the Subordinate Judge of Farukhabad, and during the pendency of the suit an application was made by the decree-holder, Kassa Mal, on the 4th January, 1887, for the recovery of the above-mentioned item of Rs. 1,000, costs of the former litigation. Thereupon, Musammat Gopi, by her application of the 25th January, 1887, applied under s. 243 of the Civil Procedure Code for stay of execution of the decree, but the application was rejected by the Court in which the second suit was pending, namely, the Court of first instance, on the 25th January, 1887, that is, the same day as the one upon which the application was made.

From this order Musammat Gopi preferred an appeal to the learned Judge of the lower appellate Court, and, by his order of the 16th April, 1887, he held that, under the circumstances of the case, the execution of the decree of the 27th November, 1886, should have been stayed pending the decision of the new suit.

From that order, this second appeal has been preferred, and in supporting it Pandit *Sundar Lal* has argued, in the first place, that inasmuch as the order of the Subordinate Judge of the 25th January, 1887, was passed under s. 243 of the Civil Procedure Code, no appeal lay to the learned Judge of the lower appellate Court·

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and in support of this contention he relies upon a ruling of a Division Bench of the Calcutta High Court in *Nehal Chand* v. *Rameshari Dassee* (1), in which it was held that in a case such as this no appeal would lie, because the order passed under s. 243, Civil Procedure Code, was not such an order as would fall within the purview of cl. (c), s. 244 of the Code, so as to render it appealable as a "decree" within the meaning of the definition of the word in s. 2 of the Code.

The ruling is no doubt in favour of the learned pleader's contention, but in a judgment of my own in the case of *Ghazidin* v. *Fakir Bakhsh* (2) I, with the concurrence of my brother Straight, held an opposite view of the law; and that view, I find, was adopted by another Division Bench of the Calcutta Court itself in *O. Steel & Co.* v. *Ichhamoyi Chowdhrain* (3), in which the view laid down in the case of *Nehal Chand* v. *Rameshari Dassee* (1) was repudiated. I still adhere to the views which I expressed in the case of *Ghazidin* v. *Fakir Bakhsh*, (2) and I have no doubt that an appeal did lie to the lower appellate Court.

And holding this view, I need not deal with the contention pressed upon me by Mr. *Kashi Prasad*, on behalf of the respondent, that if an appeal did not lie to the lower appellate Court, this appeal would, *á fortiori*, not lie, and the only possible remedy for the appellant, in that event, would have been, perhaps, an application under s. 622 of the Civil Procedure Code for revision.

The next point which has been argued before me at considerable length by Pandit *Sundar Lal* on behalf of the appellant, is that the words "*such Court*" as they occur in s. 243, Civil Procedure Code, limit the exercise of the powers contemplated by that section to decrees passed by the Court in which the suit is pending; and upon this ground the learned pleador goes further and contends that the decree sought to be executed, namely, the decree of the 27th November, 1886, being a decree passed in appeal by the High Court, the Court of first instance, even as a Court executing this Court's appellate decree, could not apply the provisions of s. 243 to such a case. The reason of the contention put before me by the learned pleader is that a Full Bench of this Court in *Shohrut Singh*

(1) I. L. R., 9 Calc. 214. (2) I. L. R., 7 All. 73.
(3) I. L. R., 13 Calc. 111.

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v. *Bridgman* (1) has held that the decree of the Court of last instance is the only decree susceptible of execution, and the specifications of the decrees of the lower Court or Courts, as such, may not be referred to and applied by the Court executing such decree. Taking the Full Bench ruling as the central point of the argument, the learned pleader contends that the decree of the 27th November, 1886, could not be dealt with under s. 243, as it was not a decree passed by the Court in which the suit was pending.

I cannot accept this contention. There is no doubt that I am bound to accept the authority of the Full Bench ruling upon which the learned pleader relies, but it is not inconsistent with that ruling to say that the decrees of the Courts of appellate jurisdiction are, by reason of ss. 581 and 583 of the Civil Procedure Code, subject to the same rules as those decrees which have been passed by the Court of original jurisdiction. S. 581 of the Code simply specifies how appellate decrees are to be dealt with, and *inter alia* it goes on to say that such decree "shall be filed with the original proceedings in the suit, and an entry of the judgment of the appellate Court shall be made in the register of civil suits."

Now the next matter which has to be considered is, how such decrees are to be executed; and upon this point, I think Mr. *Kashi Prasad* was right in calling my attention to s. 235, cl. (*d*), which in stating the contents of application for execution of decree, directly contemplates that the application for execution is to state any modifications or reversals, &c., which the appellate Court's decree may have introduced in the decree. What Pandit *Sundar Lal* contends is that, notwithstanding the provisions of ss. 581 and 583 of the Code, a Court in exercising the powers under s. 243 of the Civil Procedure Code is limited to *its own* decrees, and that such powers do not apply to decrees passed either by a Court of co-ordinate jurisdiction, or by a Court of appeal, even though such decrees may, under the rules of procedure, have to be executed by the Court to which an application under s. 243 is presented. In supporting this contention the learned pleader has, in the first place, called my attention to s. 228 of the Code, which relates to the execution of decrees transmitted by other Courts for execution to a Court, and he argues that it is only because that section specifi-

(1) I. L. R., 4 All. 376.

cally states that the powers possessed by the Court to which the decree is sent, are to be co-extensive and similar in respect of such decrees that the provisions of s. 243 would be applicable, and he contends that because s. 243 does not contain any specification of such a character with reference to appellate decrees, therefore that section would not be applicable to this case. But it seems to me that this contention is somewhat inconsistent, because as Mr. *Kashi Prasad* has contended, provisions corresponding to s. 228, so far as their application to the general rules as to execution of decrees is concerned, are to be found in s. 583 of the Code.

That section, in stating how an appellate Court's decree is to be executed, goes on to say that "such Court shall proceed to execute the decree passed in appeal according to the rules hereinbefore prescribed for the execution of decrees in suits."

Just as I have before now held that the provisions of s. 582 of the Civil Procedure Code render the earlier rules as to original suits applicable *mutatis mutandis* also to the procedure in appeals, so I also hold that the effect of the provisions of s. 583 is to render all the antecedent rules as to execution of decrees in Courts of original jurisdiction, applicable also to the execution of decrees passed by Courts of appellate jurisdiction.

And once this view is accepted, not only the provisions of s. 243 but of various other parts of the Code become applicable. For instance, the proviso to s. 246, which in stating how cross-decrees are to be dealt with for the purposes of setting off one decree against another, goes on to say (consistently with the principle which I have accepted as the basis of the rule), that "the decrees contemplated by this section are decrees capable of execution at the same time, and by the same Court." I think it is clear that by reason of this rule, the provisions of s. 228, as also of s. 243, as also of s. 583, would become applicable, and the Court executing its own decree could set off that decree against the decree passed by another Court, if that decree has been transmitted to it or is a decree of the appellate Court, when such decree is before the Court for execution. This reasoning, however, is applicable only by analogy, because the exact point before me is simply whether or not, within the meaning of s. 243 read with s. 583 of the

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Code, are included the decrees not only of the Court in which the suit is pending but also decrees of appellate Courts. As I have already said, I hold that the suit being pending before the Subordinate Judge of Farukhabad, and the High Court's decree of the 27th November, 1886, being before the Court for execution, that Court or the Court to which an appeal would lie for the purpose of the decree, had jurisdiction to stay execution within the meaning of s 243 of the Civil Procedure Code.

The only ruling against this view which Pandit *Sundar Lal* has cited to me is the case of *Mittun Bibi* v. *Bazloor Khan* (1), which turned upon the interpretation of s. 209 of the old Code of Civil Procedure (Act VIII of 1859), which section corresponds to s. 243 of the present Code of Civil Procedure. It was in interpreting that section that Jackson, J., laid down the rule that "when an application to stay execution of a decree is made to a Court in which a suit is pending against the decree-holder, the Court's competency under s. 209, Act VIII of 1859, to grant the application depends on the decree being its own decree." The other learned Judge before whom the case was argued was Hobhouse, J., who began his judgment by stating that he had some doubts in consequence of the provisions of s. 362 of the same Code (Act VIII of 1859) which section corresponds to s. 583 of the present Code upon which Mr *Kashi Prasad* has relied. It seems to me that the doubts of Hobhouse, J., were well founded, and although he deferred to the views of Jackson, J., the rule of law laid down in the case is, as I respectfully think, unsound, opposed as that rule seems to me to the broad and fundamental principles of the equitable doctrines of compensation and set-off upon which I dwelt at some length, with the approval of my brother Straight, in *Ishri* v. *Gopal Saran* (2), which, though a suit for pre-emption, involved considerations not dissimilar to those in the case, so far as the question of principle is concerned. It is doubtful whether the ruling of Jackson, J., has since been followed by the Calcutta Court itself, because Pandit *Sundar Lal* has not been able to show me any such ruling. On the contrary, the general *ratio decidendi* upon which the ruling of my brother Straight and myself in *Ghazidin* v. *Fakir Bakhsh* (3)

(1) 8 W. R., 392. (2) I. L. R., 6 All. 351.
(3) I. L. R., 7 All. 24.

proceeded, and the *ratio decidendi* of the cases to which it refers, are opposed to the ruling of Jackson J., in the case above cited, and the ruling of my brother Straight and myself, as I have already said, was adopted by the Calcutta Courts in the latest case of *O. Steel & Co.* v. *Ichhamoyi Chowdhrain* (1).

The only other point which I have got to deal with is whether or not, upon the merits of the case, the learned Judge of the lower appellate Court was right in staying execution of decree pending the decision of the present suit. Upon this point I think I need not say much, because it is admitted before me that the suit which ended in dismissal by this Court on the 27th November, 1886, was a suit filed by Musammat Gopi, the present judgment-debtor respondent, that the suit failed on a technical point of law as to whether or not the suit in its then form was maintainable, that the suit now pending before the Subordinate Judge of Farakhabad is a suit by the same Musammat Gopi against the same Kassa Mal, for purposes of a remedy which is now prayed for in lieu of that which was prayed for in the former unsuccessful litigation; that the costs awarded by the decree of the 27th November, 1886, are costs in the former decree of the older litigation, and that if the suit now pending before the Subordinate Judge succeeds, the costs might not have to be paid by Musammat Gopi, but on the contrary, she might have to recover considerable sums of money from the present decree-holder appellant, Kassa Mal, or at least, might be entitled to claim set-off for her decree against the decree for costs held by the appellant.

If the costs were a simple debt instead of being a judgment debt, the defendant might possibly have pleaded the amount as a set-off under s. 111, Civil Procedure Code, against the claim of Musammat Gopi in the suit now pending; but without deciding this question, I may add, that whilst it is not shown that the stay of execution will materially prejudice the decree-holder appellant, there are indications in the circumstances of the case, to suggest the suspicion that the execution has been prayed for by the decree-holder, mainly with the object of hampering the respondent Musammat Gopi, in prosecuting the suit now pending against the decree-holder.

(1) I. L. R., 13 Cal., 111.

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I think, under these circumstances, the learned Judge of the lower appellate Court exercised a sound discretion in staying execution of the decree of the 27th November, 1886. I dismiss the appeal with costs.

Appeal dismissed.

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February 9.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

NAGAR MAL AND OTHERS (PLAINTIFFS) *v.* ALI AHMAD AND OTHERS (DEFENDANTS).*

Act XXIII of 1871 (*Pensions Act*), *ss.* 3, 4, 6, 9—*Grant of land revenue—Suit by assignees zamindárs for arrears—Right of plaintiffs admitted by Government —Suit not barred for want of Collector's certificate.*

The sections of the Pensions Act (XXIII of 1871) restricting the jurisdiction of the Civil Courts to entertain suits relating to pensions of grants of money or land revenue must be construed strictly.

Held that a suit by the assignees from Government of land revenue, whose rights were admitted by Government, to recover arrears from persons admittedly liable to pay revenue to somebody, but who disputed plaintiffs' right thereto, came within section 9 of the Pension Act (XXIII of 1871) and was not barred by sections 4 and 6 by reason of no certificate having been obtained as therein provided.

By a proceeding of the Special Commissioner for the districts of Meerut, Agra, Bareilly and Delhi, held on the 26th of July, 1843, the lands described in the plaint filed in the suit, as also other lands which together formed the area of mauza Dumchandpur in pargana Deoband, were released from payment of revenue to Government in perpetuity, such revenue being assigned by Government to certain persons who were muafi lárs of the village, among whom the assignors of the plaintiffs in this suit were some. In the year 1861, when the settlement of the village was renewed, the zamíndárs of the village in their engagement with Government promised to pay the revenue assessed on it to the muafidárs according to a separate statement prepared at the time.

The defendants, who are some of the zamíndárs of the village, did not pay to the plaintiffs for the three fasli years from 15th November, 1882, to 15th June, 1885, the portion of revenue payable to them, and so the sum of Rs. 301-8-9, became due. The

* Second Appeal, No. 1481 of 1886, from a decree of T. Benson, Esq., District Judge of Saháranpur, dated the 28th June, 1886, reversing a decree of Maulvi Shah Amjad-ullah, Munsif of Deoband, dated the 22nd March, 1886.

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plaintiffs therefore, instituted this suit for recovery of the amount and also for a declaration of their right as representatives of the original assignees from Government of the revenue payable in respect of certain land to receive the same. They based their suit on the *wajib-ul-arz* of the year 1861 and the muafi statement then prepared.

The defendants pleaded several matters, namely, that the suit was not cognizable by the Civil Court; that the certificate mentioned in section 6 of the Pensions Act (XXIII of 1871) not having been obtained, a Civil Court cannot take cognizance of the claim, and that the plaintiffs have no right to sue them for the amount.

Munsiff of Deoband, who tried the suit in the first instance, overruling all the pleas in bar, found on the merits for the plaintiffs and decreed their claim. On appeal by the defendants the District Judge, relying on the authority of *Babiji Ram* v. *Raja Ram* (1), held that the claim was not cognizable by the Civil Court without a certificate from the Collector and dismissed the suit.

On behalf of the plaintiffs it was contended in second appeal that the suit was saved by the provisions of section 9 of the Act, and therefore cognizable by the Civil Court without the certificate from the Collector.

Hon. T. *Conlan*, Hon. *Pandit Ajudhia Nath*, and Shah *Asad Ali*, for the appellants.

Pandit Moti Lal Nehru, for the respondents.

STRAIGHT, and Tyrrell, JJ.—In this case the plaintiffs claim to have paid to them a sum of Rs. 301-8-3 for three years' arrears due to them from the zamíndárs, defendants, by a declaration of their right thereto, as the representatives of the original assignee from Government, of the revenue payable in respect of certain land. The amount of this revenue was determined at the settlement, and by paragraph 12 of the *wajib-ul-arz* the zamíndárs promised to pay it. The Munsif decreed the claim, and the learned Judge, in appeal by the defendants, decided all the pleas against them, but being of opinion that the suit was barred by the provisions of s. 4 of the Pensions Act (XXIII of 1871), the plaintiffs not having obtained the sanction required by that section, decreed the appeal

(1) I. L. R., 1 Bom., 75.

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and dismissed the suit. The propriety of this decision is the sole point raised in second appeal.

Now it is the well-understood rule that the Civil Courts have jurisdiction to try all suits of a civil nature, the cognizance whereof is not prohibited by any positive enactment, and upon the face of the plaint in the present case it is obvious that the claim of the plaintiffs would ordinarily fall within their jurisdiction. It must further be taken as conceded that the Government has not only recognised the right asserted by the plaintiffs by the action of the officer who conducted the settlement, but at the present moment admits them; that the zamíndárs themselves undertook to pay the revenue assessed to the plaintiffs, and that the defendants, who stand in the shoes of those zamíndárs, are under the same liability, but have repudiated it as alleged by the plaintiffs. There is obviously, therefore, no question between the plaintiffs and the Government, but their only dispute is with the defendants, who have denied their right. We have then to examine Act XXIII of 1871 to see if it contains any prohibition to such a dispute being made the subject of determination by a Civil Court, and in doing so it is appropriate to bear in mind what was said by Westropp, C.J., in *Ravji Mandlik* v. *Dadaji Desai* (1), that "an enactment of a character so arbitrary as Act XXIII of 1871, which purports to deprive the subject of his right to resort to the ordinary courts of justice for relief in certain cases, ought to be construed strictly, and the court should not extend its operation further than the language of the Legislature requires." (See also *Gurushidgavda* v. *Rudragavdati*) (2). It must be admitted that the moneys claimed by the plaintiffs are a grant of land revenue, which by s. 3 of the Act in question "includes anything payable on the part of Government in respect of any right," &c., and that *primâ facie* they would come within the prohibitions of s. 4 and the accompanying provision of ss. 5 and 6, and the suit would accordingly be barred, no sanction confessedly having been obtained to its institution. It remains then to be seen whether there is any saving clause in the Act to relieve the plaintiffs from the difficulty, and it is obvious that if s. 9 does not help them, there is no other provision that will. It is to be observed in regard to s. 6 that,

(1) I. L. R., 1 Bomb., 523. (2) I. L. R., 1 Bom., 537.

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while a Civil Court may take cognizance of claims to money payable on the part of Government in respect of a right upon receiving a certificate, "it shall not make any order or decree in *any suit whatever* by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

Now it seems to us that taking s. 6 in contradistinction to s. 9, the kind of claim which is contemplated by the former section is one where, a pension or grant being admitted by Government, there are several claimants to the right to receive it, in whole or in part, the merits of whose respective claims may well be adjudicated upon by a Civil Court, for the purpose of informing Government as to the proper person or persons, to whom, so long as such pension or grant is continued, it shall be paid, though such adjudication in no way binds Government to continue to pay it. In such a suit it can readily be seen why Government should be regarded as having an interest in the sense that, being ready and willing to pay the pension or grant, it desires to pay it to the right person. Reading ss. 5 and 6 together, they seem to us to provide for two alternative methods of treatment for claims of the kind we have mentioned: first, by application to the Collector and by an order made by him, or, if he thinks it more suitable, by a trial of the claim in a Civil Court on his certificate. In the present case, however, the existence of the grant, the right to which is claimed by the plaintiffs, and the plaintiffs' right thereto, are not only not denied by Government, but, on the contrary, they are admitted, and the matter simply stands thus, that the plaintiffs, as the assignees of the Government revenue payable on certain land, whose right thereto is admitted by Government, are primarily suing the defendants, who admittedly are bound to pay such revenue to somebody, for arrears due to them as such assignees. Were the suit limited to this relief merely, it would, under the terms of s. 93 of the Rent Act, lie exclusively in the Revenue Court. But the defendants, not claiming that the land is revenue-free, have denied the title of the plaintiffs as assignees, and have thus driven them into a Civil Court to establish their title, not as against counter-claimants to the assignees' right, but as against persons who withhold revenue, which is incontestibly payable by them, to others, whose right thereto is admitted by Government. It seems to us

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that such a suit only lies in the Civil Court, that it is one within the spirit of s. 9, and, as such, is saved from the prohibition of s. 4, and that the learned Judge's view was erroneous, and that the suit to which the ruling of the Bombay Court in *Babuji Hari* v. *Rajaram Ballub* (1), upon which he relied applies, is distinguishable from the present in the particulars to which we have referred.

We decree the appeal and, reversing the decree of the Judge, restore that of the first Court. The plaintiffs to have their costs in all Courts.

Appeal decreed.

1888
February 17.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BALMUKAND (DECREE-HOLDER), *v.* PANCHAM (JUDGMENT-DEBTOR).*

Pre-emption—Conditional decree—Appeal—Purchase-money—Costs—Civil Procedure Code, ss. 214, 583.

A court of first instance decreed a claim for pre-emption conditionally, on the pre-emptor paying into Court Rs. 125 within a specified period, and also awarded the pre-emptor Rs. 39-9-0 as his costs in the suit. Within the specified period the pre-emptor paid into Court the Rs. 125, and subsequently executed his decree for costs, by drawing out therefrom the Rs. 39-9-0. After this the decree was modified on appeal, the appellate Court raising the Rs. 125 payable as the condition of pre-emption to Rs. 200, and reversing the first Court's order as to costs. Within the period specified in the appellate Court's decree the pre-emptor paid into court the further sum of Rs. 75. Subsequently the vendee, defendant, applied to the Court under s. 583 of the Code of Civil Procedure to have the property in suit restored to him, contending that the pre-emptor had failed to pay the full Rs. 200 within the prescribed period.

Held by Straight, J., affirming the judgment of Mahmood, J., that this contention must fail; that the payment of Rs. 125 due under the first Court's decree could not be said to have been reduced by the pre-emptor subsequently executing against the amount so paid the order of that Court in his favor for costs, and that the subsequent payment of Rs. 75 within the period prescribed by the appellate Court satisfied the requirements of that Court's decree, subject to the judgment-debtor's right to recover the costs realised in execution of the first Court's decree.

Held by Tyrrell, J., *contra*, that although the pre-emptor had once made a payment, which for a few days was a compliance with the first Court's decree, such compliance became immaterial when that decree was modified on appeal, and as he had never had in any Court a credit for Rs. 200, as required by the appellate Court's decree, which alone was the decree in the cause, he had failed to fulfil the condition essential to pre-emption, and therefore the defendant's application should be allowed.

* Appeal No. 7 of 1887 under s. 10, Letters Patent.

(1) I. L. R., 1 Bom., 75.

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THIS was an appeal, under s. 10 of the Letters Patent, from a judgment of Mahmood, J.

The facts are sufficiently stated in the judgments of the Court.

Lala Moti Lal Nehru, for the appellant.

Lala Jokhu Lal, for the respondent.

MAHMOOD, J.—The facts necessary for the disposal of this appeal may be briefly recapitulated as follows :—

One Musammat Umedi Kuar, by a sale-deed executed on the 10th July, 1883, sold the property now in suit in favor of Balmukand, the appellant before me. That sale appears to have been made in contravention of the pre-emptive right possessed by Pancham, the respondent before me, and he sued for the enforcement of that right, and on the 20th December, 1883, obtained a decree awarding him the pre-emptive right and possession of the property on payment of a sum of Rs. 125, together with costs. From that decree an appeal was preferred by the purchaser, Balmukand, and the lower appellate Court, which had to deal with that case, decreed the appeal so far as to increase the sum of Rs. 125 to Rs. 200 as consideration of the sale, and in regard to costs that Court decreed that the parties should pay their own costs. The decree specified that the sum of Rs. 200 was to be deposited by the pre-emptor within a month of the time when that Court's decree would become final, by which it must be understood, as has been held in more than one ruling, to be the date upon which the period of limitation for an appeal would expire.

In the meantime it appears that Pancham, respondent, having obtained the decree of the first Court dated the 20th December, 1883, went with Rs. 125 to the Court which passed that decree, on the 15th January, 1884, and on that date deposited the sum of Rs. 125 which that decree directed. The deposit was undoubtedly within the time allowed by that decree, and there is no question that it was a valid deposit of the purchase-money. But the decree under which the deposit was made also awarded costs amounting to Rs. 39-9-0 to Pancham, and it appears that subsequently, by executing that decree, he realized the sum last mentioned from the Court on the 5th March, 1884. Both these facts

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are antecedent, of course, to the appellate Court's decree of the 18th April, 1884. It then appears that, in obedience to the latter decree, the said Pancham deposited a sum of Rs. 75 on the 14th May, 1884, in order to make up the earlier deposit of Rs. 125 up to the sum of Rs. 200 as required by the appellate Court's decree.

Certain proceedings then appear to have taken place in the Court of first instance, to which it is not necessary to refer beyond saying that they led to an application for review of judgment preferred by Balmukand, the present appellant, to the lower appellate Court, praying for review of that Court's decree of the 18th April, 1884. The application appears to have been granted, and the decree of the 18th April, 1884, was considerably modified in respect of the order as to costs, and such modification is indicated in the order passed upon review dated the 3rd February, 1885.

It is the decree as modified by this last-mentioned order in respect of which Balmukand presented the application from which this appeal has arisen. The application was made on the 6th June, 1885, praying that the property in respect of which Pancham had succeeded in enforcing pre-emption might be restored to the applicant, because Pancham had not deposited the whole amount of Rs. 200 within the period limited either by the decree of the 18th April, 1884, or by the amended decree of the 3rd February, 1885, inasmuch as he had taken away the sum of Rs. 39-9-0 as costs under the decree of the first Court dated the 20th December, 1883, which decree, as I have already mentioned, had been modified by the lower appellate Court as to costs.

Both the Courts have rejected this contention upon the ground that, under the circumstances of the case, Pancham, the pre-emptor, had fulfilled the conditions of the lower appellate Court's decree in respect of the deposit of Rs. 200.

I am of opinion that the conclusion at which the lower Courts have arrived is sound under the circumstances of this case. In the first place, the first Court's decree of the 20th December, 1883 was duly obeyed by the pre-emptor Pancham when he made the deposit of Rs. 125 on the 15th January, 1884, and it was in due obedience to that same decree that he realized the sum of Rs. 39-9 on the 5th March, 1884, as the costs of the litigation to which he

was declared entitled by that Court's decree. The lower appellate Court's decree of the 18th April, 1884, which increased the amount of Rs. 125 to the sum of Rs. 200, was also duly obeyed by Pancham, the pre-emptor, when he made the additional deposit of Rs. 75 on the 14th May, 1884. The effect of such deposit was that, as a matter of fact, Rs. 200 were deposited in obedience to the decree of the 18th April, 1884, which decree in this respect was not modified by the decree passed on review dated 3rd February, 1885.

What is argued now is simply the question that because on the 5th March, 1884, Pancham, the pre-emptor, took away the sum of Rs. 39-9, in execution of the decree of the 20th December, 1883, it was his duty, in obeying the decree of the appellate Court of the 18th April, 1884, to have deposited on the 14th May, 1884 not only the sum of Rs. 75 but also the sum of Rs. 39-9 which he had already taken away as I have mentioned. It appears to me that this contention involves a conclusion between two different matters which require consideration in this case. Whether or not the order whereunder Pancham took away Rs. 39-9 on the 5th March, 1884, was a legal and valid order is one question, and the question whether the deposit of Rs. 125 made on the 15th January, 1884, and the additional deposit of Rs. 75 made on the 14th May, 1884, did or did not amount to a deposit of Rs. 200 within the meaning of the appellate Court's decree, is another. It is only the last question I am called upon to consider. I hold that the lower appellate Court's decree being dated the 8th April, 1884, and the two deposits aggregating to Rs. 200, having been made within the time fixed, the pre-emptor did not forfeit the pre-emptive rights which had been declared in his favour by that decree. The terms of s. 214 of the Code which relate to such matters contain no provisions that under conditions of this character the right already established, proved, and decreed should be vitiated simply because by an order of the Court, erroneous or not, a portion of the price deposited was returned in execution of a decree. It is not necessary for me to decide any question as to the order whereunder Rs. 39-9 were taken by Pancham, but I think I may say, that in circumstances such as these, it is likely, there is still open to the present purchaser Balmu-

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kand, appellant, the remedy to obtain restitution of the sum of Rs. 39-9 which Pancham took away under the order of the Court, and that such remedy could be obtained by him under the appellate decree of the 18th April, 1884, amended as it was on the 3rd February, 1885. Upon the general principles relating to the doctrine of restitution, I need only refer to the case of *Jaswant Singh* v. *Dip Singh* (1). This being so, I do not think that the plea urged on behalf of the appellant is sustainable. I dismiss this appeal with costs.

The defendant appealed from this decision under s. 10 of the Letters Patent.

The parties were represented as before.

STRAIGHT, J.—I concur with my brother Mahmood's judgment in Single Bench. It seems to me that when the Munsif accepted the Rs. 125 on the 15th of January, 1884, as satisfying the condition contained in the decree of the 20th December, 1883, and put the pre-emptor in possession, the purchase price directed thereby to be paid must be taken to have been then and there *pro tanto* discharged, and the payment ought, in my opinion, to hold good, in any event, as and for the full amount of Rs. 125. The fact that upon another application and by way of executing the decree, which by the payment of the Rs. 125 had become absolute in favour of the pre-emptor and so capable of execution for his costs, a sum of Rs. 39-9 was on the 5th March, 1884, paid to the decree-holder in respect of such costs, does not appear to me to alter or qualify the nature of such payment any more than could be the case where a debtor who has paid a sum of money to his creditor for the liquidation of a specific debt, which is accordingly written off as specified, can be said to reduce such payment by the amount of any subsequent loan taken by him from the creditor. *Qud* the Munsif's Court which admitted the decree to execution on payment of the Rs. 125, the whole amount was held to the credit of the vendee from the 15th January, 1884 to the 1st of March, 1884, and he might have withdrawn it at any moment. On the 1st of March it stood as money belonging to the vendee, against which the pre-emptor was entitled to execute for his costs, and that the

(1) I. L. R., 7, All., 432.

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Court so regarded it is evident by its first paying out the Rs. 39-9 and subsequently receiving the Rs. 75 on the 14th May, 1884, as sufficiently making up the Rs. 200, which the appellate Court had found to be the true price and had called upon the pre-emptor to deposit. The Court having accepted the Rs. 75 as satisfying the requirements of the appellate decree, it would, in my opinion, be most inequitable to hold that it did not, more particularly as the pre-emptor has in the proceedings the subject of the present appeal, expressed his willingness to refund the costs he realized, and for aught that appears to the contrary, has all along been ready to do so. In dealing with the appellate decree, I think the Courts were justified in regarding the Rs. 125, paid in compliance with the Munsif's decree, as a payment to that amount on account of the Rs. 200 subsequently ordered to be paid by the appellate Court, and as in no way involved in distinct questions arising between the parties in reference to costs. I am not prepared, therefore, to hold that the Courts below, whose orders my brother Mahmood has upheld, were wrong in taking the view that there had been no default on the part of the pre-emptor, and I therefore dismiss the appeal with costs.

TYRRELL, J.—On the 20th December, 1883, Pancham, respondent, got a decree under s. 214 of the Civil Procedure Code, enforcing his right of pre-emption as against Balmukand, appellant, on condition of his paying Rs. 125 as purchase-money within a specified time. This decree also awarded Rs. 39-9 as costs by Balmukand to Pancham.

On the 15th January, 1884, Pancham paid this purchase-money of Rs. 125 into Court and obtained from the Court possession of the estate in suit.

On the 5th March, 1884, Pancham drew out of the hands of the Court Rs. 39-9 from the purchase-money he had deposited, reducing it thus to a sum of Rs. 85-7.

On the 18th April, 1884, the appellate Court, on the appeal of the vendee Balmukand, decreed that the true purchase-money payable to the latter by Pancham was Rs. 200 instead of Rs. 125, and it cancelled the award of Rs. 39-9 as costs payable by Balmukand to Pancham. By this decree then, which is the only

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decree to be looked to in the execution of the case, Pancham's possession of the estate was made conditional on his putting the Court executing the decree in a position to pay over Rs. 200, and no less sum, to Balmukand. Now at the date of this decree Pancham had a credit by way of deposit in the Court of first instance, which was charged with executing the decree, to the amount of Rs. 85-7 only.

On the 13th May, 1884, he deposited Rs. 75 only, making a total deposit of Rs. 160-7 only as the purchase-money of the estate. On the 3rd February, 1885, it was brought to the notice of the appellate Court that its decree of the 18th April, 1884, had omitted to provide for the costs of the vendee on the contingency of the pre-emptor not paying the purchase-money. The Court amended its decree by declaring that the pre-emptor failing to pay the purchase-money decreed should pay the vendee Rs. 36-11 as his costs. It is obvious that the appellate Court would not have allowed this motion for review, which would have been futile and superfluous, if it had regarded Pancham as having complied with its order by depositing Rs. 75, only as mentioned above. On the 6th June, 1885, the vendee Balmukand applied to the Court, under s. 583 of the Civil Procedure Code, to have the property restored to him in consequence of Pancham's failure to pay the full purchase-money within the decretal period. Both the Courts below, and Mahmood, J., here, sitting in jurisdiction over second appeals of small value, have held that Pancham had complied with the decree ordering him to pay Rs. 200 as purchase-money to Balmukand. The main reason for this view seems to be that Pancham did actually once make a payment which at the moment, and for a few days, was a compliance with the decree of the Court of first instance. But it seems to me to be undeniable that Pancham has never complied with the decretal condition of the true decree in the case, the decree directing payment of Rs. 200. The decree of the Court of first instance passed out of existence on the 18th April, 1884, and we need not consider whether the pre-emptor may have complied with its terms or not. It seems to me to be undeniable that the pre-emptor has not at any moment of time from the date

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of the institution of his suit, to the present hour, had a credit in any Court for Rs. 200, and that he has, therefore, failed to fulfil the condition essential to his possession of the vendee's estate under the decree in the suit. I fail to see how his profession of willingness now, to complete the payment long after the expiry of the decretal period, can alter his position for the better in this respect.

Under these circumstances, I think the Courts below were wrong, but as my brother Straight's decree is decisive of the appeal to the contrary, it is unnecessary to formulate the order which, from my point of view, should have been made in the case.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

1888
March 2.

RAMADHIN AND ANOTHER (PLAINTIFFS) *v.* MATHURA SINGH AND OTHERS (DEFENDANTS)*

Hindu Law—Hindu widow—Gift by Hindu widow of her own interest and that of consenting reversioner.

A Hindu widow in possession can, with the consent of a reversioner, make a valid gift which will operate so far as the interest of the widow and that of the consenting reversioner are concerned. *Rany Srimuty Dibeah* v. *Rany Koond Lata* (1) *Kooer Goolab Singh* v. *Rao Kurun Singh*, (2) *Sia Dasi* v. *Gur Sahai* (3) and *Raj Bullubh Sen* v. *Oomesh Chunder Roor*, (4) referred to.

Ramphal Rai v. *Tula Kuari* (5) distinguished.

One Lachman Singh died some years ago leaving a widow Dharm Kuar, and a daughter, Piari Kuar. He was possessed of an eight-anna share in mauza Kharsa and some houses and gardens. On his death his widow inherited the same, and her name was recorded in respect thereof. On 25th March, 1879, she executed a deed of gift of the property in favor of one Himmut Singh, a son of her daughter, Piari Kuar. It was stated in the deed that the gift was made with the consent of Piari Kuar. Dharm Kuar died in September, 1879, leaving her daughter and two sons by her, *viz.*, the said Himmut Singh and Bhawani Singh.

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* First Appeal, No. 110 of 1886, from a decree of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 19th February, 1886.

(1) 4 Moo. I. A. 292. (3) I. L. R., 3 All., 362.
(2) 14 Moo. I. A. 176. (4) I. L. R., 5 Cal., 44.
(5) I. L. R., 6 All., 116.

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RAMADHIN v. MATHURA SINGH.

By a sale deed dated 26th June, 1879, Himmut Singh conveyed half of the eight-annas share in the mauza to the plaintiffs in consideration of Rupees 7,700. Soon after this Himmut Singh died, and he could not therefore get the sale deed registered.

After his death the plaintiffs applied to the Revenue Court for entry of their names in respect of the four-anna share conveyed to them, but on the objection of the minor son of Himmut Singh the application was refused. Plaintiffs thereupon instituted this suit for possession of the said four annas with mesne profits, against Mathura Singh, the minor son of Himmut Singh, Piari Kuar, and Bhawani Singh, brother of Himmut Singh.

Mathura Singh contended that Dharm Kuar was not competent to make the gift, and on the death of Dharm Kuar the entire estate devolved on Piari Kuar, and the sale deed executed by Himmut Singh became void on the death of Dharm Kuar.

Piari Kuar also contested the suit on the above grounds, but she had in a previous suit admitted that the gift by her mother was made with her consent.

The Subordinate Judge holding that property inherited by a Hindu widow cannot be alienated by her, and relying on *Ramphal Rai* v. *Tula Kuari* (1) dismissed the suit. Plaintiff appealed and defendants contended that the only interest that passed under the gift was the life-interest of the widow, and that the consent by the daughter to the gift by her mother would not affect her interest. It was further contended that there could be no gift by the daughter of her reversionary interest.

Hon. T. *Conlan* and Hon. *Pandit Ajudhia Nath*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This is an action for possession of a four annas share and for mesne profits.

The case of the plaintiff is that one Dharam Kuar, the Hindu widow of Lachman Singh, on the 25th March, 1879, with the consent of her daughter Peari Kuar, a defendant, made a gift of an eight annas zamíndári share to Peari Kuar's son Himmat Singh, and that on the 26th July, 1879, Himmat Singh, having obtained

(1) I. L. R., 6 All., 116.

possession, sold a four annas share of the eight annas to the plaintiff for Rs. 7,700. The plaintiffs applied in 1880 or 1881 for mutation of names. That application was successfully resisted by Himmat Singh's son, Mathura Singh. Mathura Singh was the original defendant in the action. After the commencement of the action, Peari Kuar, Himmat Singh's mother, and Bhawani Singh, a son of Peari Kuar and brother of Himmat Singh, were made defendants. It is here admitted on the arguments that Peari Kuar did in fact consent to the gift which was made by Dharam Kuar, and not only consented to the gift by Dharam Kuar of her life interest but also of the life interest of Peari Kuar. It could not have been contended on the evidence in this case that Peari Kuar did not consent to that extent. We have before us the written statement which was filed by Peari Kuar in the case of Madho Singh and others on 25th July, 1879. That statement, as explained by Peari Kuar's evidence, is conclusive on the point, and corroborates the statement contained in the deed of gift of March, 1879. Dharam Kuar died in September, 1879. On these facts it has been contended that the only interest which passed under the deed of gift to Himmat Singh was the life interest of Dharam Kuar, and that the consent of Peari Kuar to the gift made by her mother would not affect Peari Kuar's interest. It has also been contended that there could be no gift by Peari Kuar of her reversionary interest; as she could not give possession of the property at the time of the gift in 1879. The Subordinate Judge found in favour of the defendant on the ground that Dharam Kuar had no power to make the gift, and that Peari Kuar was not competent to give her consent if in fact she had done so, and he relied in support of that finding in law on the case of *Ramphal Rai* v. *Tula Kuari* (1). The case there was one in which another reversioner was impeaching a gift made by a Hindu widow in possession with the consent of her then next reversioner. That case would no doubt have a bearing on the present, if it were necessary for us to decide, whether or not the plaintiffs became entitled to more than the life interests of Dharam Kuar and Peari Kuar. In this case we have only to consider whether the plaintiffs were entitled to possession and to the *mesne* profits claimed, and we are invited only to consider

(1) I. L. R., 6 All., 116.

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that question. We have not here to consider who will be the person entitled to the four annas share on the death of Peari Kuar. That is a question which we leave to be decided in a further action when the time comes. We are of opinion that it is quite clear that a Hindu widow in possession can, with the consent of a reversioner, make a valid gift, which will operate so far as the interest of the widow and that of the consenting reversioner, in this case Peari Kuar, are concerned. It appears to us that that is the principle to be found in the judgment in the Privy Council case of *Rany Srimuty Dibeah* v. *Rany Koond Luta* (1) and in the judgment of the Privy Council in *Koose Goolab Singh* v. *Rao Kurun Singh* (2). The judgment of this Court in *Sia Dasi* v. *Gur Sahai* (3) and the judgment of the Calcutta High Court in *Raj Bullubh Sen* v. *Oomesh Chunder Rooz* (4) support the view of the law which we hold.

There is uncontradicted evidence here that the sale-deed of the 26th July, 1879, was a genuine sale-deed and that the consideration therein mentioned passed. We find as a fact that the sale of 26th July, 1879, was a genuine sale, and that the consideration mentioned in the sale-deed passed.

The plaintiffs are entitled to the possession of the four annas share at least for the life-time of Peari Kuar; they are also entitled to mesne profits as against Mathura Singh, defendant, from the commencement of the suit to the date of our decree. We decree accordingly, and we direct an enquiry under s. 212 of the Code of Civil Procedure to be made by the Subordinate Judge as to the amount of mesne profits and direct him to report to us, when we will make further orders. The appeal so far will be allowed with costs. We make no declaration as to the title of the rights of the parties at the death of Peari Kuar.

Appeal decreed.

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(1) 4 Moo., I. A. 292.
(2) 14 Moo., I. A. 176.
(3) I. L. R., 3 All., 302.
(4) I. L. R., 5 Calc., 44.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

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March 27.

RAM NARAIN (DEFENDANT) v. BISHESHAR PRASAD (PLAINTIFF).*

Civil Procedure Code, s. 13, explanation v.—Joint Hindu family—Suit against two members—Second suit against third member—Res-judicata.

The plaintiff sued the father and brother of defendant for trespass to a wall. His right to the wall was denied, but he obtained a decree. On executing the decree he was resisted by the defendant, who claimed the wall as his ancestral property and alleged that he was no party to the suit in which decree had been obtained against his father and brother. His claim was registered as a suit under s. 331 of the Code of Civil Procedure. Plaintiff contended that defendant was concluded by the decree obtained against his father and brother.

Held that a Hindu son in a joint family becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father; he does not claim under his father within the meaning of s. 13 of the Civil Procedure Code.

Held also that the defendants in the former suit did not claim any right in common for themselves and others within the meaning of Explanation V. of s. 13 of the Code of Civil Procedure.

The case of *Narayan Gop Habbu* v. *Pandurang Ganu* (1) distinguished.

Bisheshar Prasad sued two members in a joint Hindu family for trespass to a certain wall. These members were the father, Chhotu, and one of his sons, Ram Prasad. They alleged that the wall did not belong to the plaintiff, but to them. The dispute was referred to arbitration, and the arbitrator decided in favour of the plaintiff, who obtained a decree in accordance therewith. When the plaintiff took out execution of his decree, he was resisted by Ram Narayan, the second son of Chhotu, on the ground that the wall was ancestral property, and he was no party to the decree obtained against his father and brother. The result of this obstruction was the registration of Ram Narayan's claim as a suit between the plaintiff and him. The plaintiff pleaded *res-judicata*, this plea being founded on the decree he had obtained against Chhotu and Ram Prasad. The Court of first instance disallowed his plea, and found that the wall did not belong to the plaintiff, and altered the former decree. On appeal by the plaintiff the lower appellate Court held that the former decree was binding on Ram Narayan, defendant,

* Second Appeal, No. 1078 of 1886, from a decree of C. Donavan, Esqr., District Judge of Benares, dated the 4th September, 1886, reversing a decree of Pandit Rajnath, Munsif of Benares, dated the 17th April, 1886.

(1) I. L. R., 5 Bom. 635.

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and reversed the decree of the first Court in this case in so as it altered the former decree.

The defendant appealed to the High Court.

Hon. *T. Conlan* and Munshi *Sukhram* for the appellant.

Mr. *Howell* and Munshi *Juala Prasad*, for the respondent.

EDGE, C. J.—The plaintiff in this suit had in a previous suit sued a father and son, alleging that they had wrongfully opened a door in a certain wall which stood on his land. That was really an act of trespass. The defendants, amongst other defences, alleged that the wall in question was their property and stood on their land. The matter was referred to an arbitrator. The plaintiff got an award in his favour and on that award a decree was passed on the 26th September, 1885. The defendant in this action opposed the execution of the decree upon that award and on the ground that he was no party to the action. It appears that the defendants in the former action and the defendant in this action were and are members of a joint Hindu family; one of the defendants in the former action being the father, the other being the son. The lower appellate Court considered that this case came within Explanation V of s. 13 of the Code of Civil Procedure, and held that the present defendant was concluded by the findings of the arbitrator, although personally he had not been a party to the former action or award. The lower appellate Court also found that the present defendant was aware of the proceedings which were being taken in the former action. I think that we should be careful in applying Explanation V. of s. 13 of the Code of Civil Procedure, and that the Explanation should not be applied to any case which does not come within the very wording of that Explanation. The defendants in the former action did not claim any right in common for themselves or others within the meaning of Explanation V. What they said was, you cannot maintain your action because the wall is ours. They said nothing about other persons being equally interested in the wall, nor does it appear that they were sued or defended the action as representatives of the family. Mr. *Juala Parsad* for the respondent frankly admitted that Explanation V. did not apply to this case. We think it does not. He, however, contended that s. 13 of the Code of Civil Procedure did apply. The parties here were

not the same parties as those in the former action, nor can the defendant here be said to claim under either of the defendants in the former action. The Hindu son in a joint family, as I understand the law, becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father. He does not claim under his father within the meaning of s 13 of the Code of Civil Procedure. A person is said to claim under another when he derives his title through that other by assignment or otherwise. We have been pressed with the case of *Narayan Gop Hubbu* v. *Pandurang Ganu* (1). In that case the learned Judges found that the other members of the Hindu family whom they held to be bound by the previous proceedings had been actually assenting members of the Hindu family, who had assisted in the previous proceeding the manager of the Hindu family. They evidently treated that manager as a person who had conducted the previous litigation as the representative and on behalf of the whole family. Here the only thing that appears is that the present defendant knew that the previous action and arbitration was going on. We have also been pressed with cases in which it has been held that a decree obtained against a Hindu father for a debt, is binding against the other members of a Hindu family. Those cases are not analogous to the present. They depend, I think, more on the obligation of a Hindu son to pay his father's debts not improperly incurred, and upon the presumption in some of those cases that the action was brought against the father as the representative of the family and the family property. On the face of this case I see no such presumption. In fact, if the father was sued as representative of the Hindu family, it is not easy to see why one of his sons, namely Ram Prasad, was made a defendant with him. In my opinion s. 13 of the Code of Civil Procedure does not apply to this case, and in coming to this conclusion, I am supported by the judgment of my brother Straight in *Ramanand* v. *Koleshar* (2). The lower appellate Court has not gone into the merits of the case. The case will be remanded for trial under s. 562. This appeal is decreed, and the decree of the lower appellate Court set aside; the costs will abide the event.

MAHMOOD, J.—I concur. *Remanded.*

(1) I. L. R., 5 Bom., 685. (2) Weekly notes, 1887, p. 217.

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March 27.

REVISIONAL CRIMINAL.

Before Mr. Justice Tyrrell.

QUEEN-EMPRESS v. MUNNA LAL AND ANOTHER.*

Criminal Procedure Code, s. 289—"*No evidence*"—*Acquittal of accused without taking opinions of assessors*—*Criminal Procedure Code, s.* 537.

The words "there is no evidence" in s. 289 of the Code of Criminal Procedure, 1882, cannot be extended to mean *no satisfactory, trustworthy or conclusive evidence*; but the third paragraph of the section means that if at a certain stage of a Sessions trial the Court is satisfied that there is not on the record, any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged, then the Court has power, without consulting the assessors, to record a finding of not guilty.

But where a Court so acts only because it considers the evidence for the prosecution unsatisfactory, untrustworthy, or inconclusive, it acts without jurisdiction, and its order discharging the accused is illegal. Even if not illegal for want of jurisdiction, such action is a serious irregularity, which may or perhaps must have caused a failure of justice within the meaning of s. 537 of the Code of Criminal Procedure.

In the matter of the petition of Narain Das (1) referred to.

In this case two persons, named Munna Lal and Badri, were tried before the Sessions Judge of Cawnpore on a charge of murder. The Judge, at the close of the case for the prosecution, and without taking the opinions of the assessors, acquitted the accused by a judgment in the following terms:—

"I have without hesitation closed the proceedings in this case, without calling upon the accused to enter on their defence; and I proceed, under the third clause of s. 289 of the Criminal Procedure Code, to record a finding without taking the opinion of the assessors. The deceased, Sahib Din, was taken out of a well in the accused's compound, or *Ihatah*, dead. The medical evidence shows that there was one slight bruise on the deceased's forehead and no other marks of injury. The surgeon gave it as his opinion that death had been caused by drowning, but could not speak positively on this point. The theory of the prosecution is this: that deceased was sent for by the accused on account of a dispute pending between them; that he was beaten by the two accused with sticks in a large enclosure, or *Ihatah*, adjoining their house; that this *Ihatah* is commonly

* Application for Revision, No. 135 of 1888, of the order passed by H. D'Moule, Esq., Sessions Judge of Cawnpore, dated 13th September, 1887, acquitting Munna Lal and Badri, committed for trial to the Court of Sessions on a charge under s. 302, Indian Penal Code.

(1) I. L. R., 1, All., 610.

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used as a thoroughfare by all sorts of people going to and fro, and that it can also be easily seen into from various outside points; that the beating took place at 10 A.M. on market day; that the deceased was killed or stunned by the beating, and was then carried by the two accused to the large *pucca* well close by and thrown in; that this crime was witnessed by a number of eye-witnesses, most of them friendly to the deceased; that not one of these witnesses interfered to prevent the murder; that none of them made any remark on the subject to one another or to the accused; that they, each and all, went quietly home and mentioned what they had seen to none until sent for by the police, when the inquiry into the case began.

"Such a wildly improbable theory would have to be supported by the most absolutely reliable, consistent, and unprejudiced evidence to gain any belief whatever. But in this case, not only are the witnesses mostly prejudiced against the accused, but there are gross discrepancies between the statements which they have made at various times, and improbabilities in their method of explaining difficulties, which would be sufficient iscredit a really probable and reasonable theory.

"It is not difficult to guess what really occurred in this case. But it is no part of the duty of this Court to frame conjectures unsupported by formal evidence.

"It is enough to say that the deceased must have either fallen into the well or thrown himself into it, for some reason which has not been fully disclosed. The whole body of evidence for the prosecution being utterly discredited, there are no grounds for framing any charge of a lesser offence, such as assault or hurt, against the accused. They must be acquitted."

The complainant in the case, one Misri Lal, son of the deceased, applied to the High Court for revision of the Sessions Judge's order, principally on the following grounds:—

"1. Because the order of the lower Court, under para 3 of s. 289 of the Criminal Procedure Code, is illegal, as it cannot be said that there was no evidence against the accused on the record.

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"2. Because the learned Judge should have allowed the case to go to the assessors, and he and they should have decided on the credibility of the evidence.

"3. Because the order of acquittal in this case, which was improperly given, was illegal, and should be set aside, and a new trial ordered."

Mr. *W. Colvin*, for the petitioner.

Mr. *G. T. Spankie* and Munshi *Nawal Bihari Bajpai*, for Munna Lal and Badri.

Mr. *G. E. Ross* (Public Prosecutor), for the Crown.

TYRRELL, J.—This is an application arising out of a Sessions trial held at Cawnpore, in which Munna Lal and Badri were tried on a charge of murder, in a prosecution instituted on the complaint of one Misri Lal, the son of Sahib Din, deceased. The case for the prosecution appears to have been closed, the trial being held with the aid of assessors; the examination of the accused had been put in evidence, and the accused had expressed their intention of calling witnesses, when the presiding Judge closed the trial, holding that there was *no evidence* that the accused had committed the offence of murder, and the Judge proceeded to record a finding of acquittal. This application is made for revision of this order, on the ground that the Judge was not competent, under the circumstances of this case, to make such an order. The order was made under the third paragraph of s. 289 of the Code of Criminal Procedure. If there had been no evidence on behalf of the prosecution, the order was right and legal. On the other hand, if there was any evidence which would be legal proof of the guilt of the accused in the event of the evidence being held to be trustworthy, the order was illegal.

Now, the Judge recorded that "a number of eye-witnesses" had deposed to seeing Sahib Din murdered, but he refused to believe them, because he thought them prejudiced and discrepant in their statements. It has been argued by Mr. *Spankie* for the acquitted persons, Munna Lal and Badri, that the words "there is no evidence" in s. 289 of the Criminal Procedure Code may be extended so as to mean *no satisfactory, trustworthy, or conclusive evidence*; but I do not think that this view is correct. If we were

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to understand the words in this sense, it would be competent to a Sessions Judge to exclude his assessors from their share of the trial whenever he thought the evidence unsatisfactory or inconclusive. He might terminate any trial before him without consulting the opinion and using the judgment of the assessors, by finding that the evidence was not to be believed, and by directing a verdict of acquittal to be recorded. It is clear that it is not the intention of the Legislature that the Sessions Judges should have such a power, or that assessors might be confined to the function of giving their opinions on the evidence, in those cases only, in which the Judge was inclined to believe the evidence for the prosecution. Several rulings have been cited here to-day in support of the contrary proposition. They are to be found in *Queen* v. *Musammat Mina Nuggerbhatin* (1), *Queen* v. *Bhugwan Lall* (2), *Queen* v. *Rutton Dass* (3), in re *Hurro Shaha* (4), and *Queen* v. *Matam Mal* (5). I have no doubt that the meaning of the third paragraph of s. 289 of the Criminal Procedure Code is, that if at a certain stage of a Sessions trial the Court is satisfied that there is not upon the record any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged against the accused, then the Court has power, without consulting the assessors, to record a finding of not guilty. But the Sessions Judge, acting with the aid of assessors, has no such power because only he considers the evidence unsatisfactory, untrustworthy, or inconclusive. In my view a Court acting in this way acts without jurisdiction, and its order in discharging the accused is illegal. But I have been referred by the learned counsel for the acquitted persons to a ruling of this Court *in the matter of the petition of Narain Das*, (6), in which procedure of this kind was designated as "a serious irregularity." I am willing to treat the order made by the Sessions Judge of Cawnpore, in this case, as being no more than a serious irregularity; and it would then be necessary to see whether, under s. 537 of the Criminal Procedure Code, the irregularity was one which has occasioned a failure of justice. To my mind it is obvious that there may have been, and perhaps must have been, a failure of justice in consequence of the way in which the

(1) 3, W. R., Cr., 6.
(2) 15, W. R., Cr., 3.
(3) 16, W. R., Cr., 19.
(4) Ibid., Cr., 20.
(5) 22, W. R.; Cr., 34.
(6) I. L. R., 1 All., 610.

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trial has been held. It is obvious that the prosecution must have been prejudiced by the omission of some important steps in the progress of the trial. The prosecution was debarred from summing up the case, and the Sessions Judge precluded himself from the advantage of taking the opinion of the assessors upon the evidence. Serious effects might have been produced upon his mind, if he had had the advantage of the opinion of the assessors, in a case, in which the whole question was, whether a considerable number of native witnesses of the lower ranks of life, had or had not told probable stories on behalf of the prosecution. And further, it is conceivable that if the case had proceeded to its legal termination, the proceedings which have since, in consequence of the Judge's order of acquittal, been taken against the son of Sahib Din and against his witnesses, might not have been instituted. But whether the Sessions Judge's order is illegal, as made without jurisdiction, or is a serious irregularity, I hold that it must be set aside, and I hereby set it aside and cancel all the proceedings held in the trial which terminated on the 13th September, 1887.

Acquittal set aside.

APPELLATE CIVIL.

1888
March 23.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

GADU BIBI AND OTHERS (PLAINTIFFS) *v.* PARSOTAM (DEFENDANT)*

Limitation—Acknowledgment signed by one of several partners—Act XV of 1877 (Limitation Act), s. 21.

The word "only" in sec. 21, of the Limitation Act (XV of 1877), is not to be treated as a surplusage. It means that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partner, unless it can be shown that he had otherwise power to bind that partner for the purpose of making such acknowledgment, and in effect purported so to bind him.

The facts of this case are stated in the judgment of the Court.

Pandit *Bishambar Nath* and Munshi *Juala Prasad*, for the appellants.

Munshi *Hanuman Prasad* and Mr. *Simeon*, for the respondent.

* Second Appeal, No. 1452 of 1886, from a decree of W. J. Martin, Esq., District Judge of Mirzapur, dated the 16th July, 1886, confirming a decree of Babu Iari Prasad, Subordinate Judge of Mirzapur, dated the 4th May, 1886.

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BRODHURST and TYRRELL, JJ.—The appellants are owners of a cloth business in Mirzapur. They sued the members of a firm called Sheoambar-Ram Narain for a balance, due on an account signed for the firm, by a member thereof named Mata Prasad. The Subordinate Judge of Mirzapur, who tried the original suit, gave the plaintiffs a decree against Mata Prasad only, exempting the other member of the firm, named Durga Prasad. The learned District Judge of Mirzapur in first appeal confirmed this view and refused the plaintiffs relief against Durga Prasad.

Durga Prasad died after the institution of this appeal in this Court, and upon the application of the appellants Parsotam, a minor under the guardianship of his mother, was brought into the appeal as respondent by an order of one of the Judges of this Court. A preliminary objection was taken to day to the hearing of this appeal by the learned pleader of the respondent, who contended that the application to bring the legal representative of the deceased Durga Prasad on the record, not having been made within the period allowed by law, the appeal had abated. We disallowed this objection, as we held that the appellants had shown sufficient cause why the application was not made within the term allowed. We are satisfied that the appellants had no knowledge of the death of Durga Prasad, and under their peculiar circumstances, had no ordinary means of knowing about the death of Durga Prasad, until after the period of limitation for making the application had expired.

As to the appeal itself, the learned District Judge found upon the evidence before him that Durga Prasad was a member of the Sheoambar-Ram Narain firm. He also found that Mata Prasad had unquestionably acknowledged a balance of Rs. 1,086-9-0 to be due on Pus badi 15, Sambat 1940, from the firm of Sheoambar-Ram Narain to the plaintiffs in this case He said:—"I have compared and found this correct—Mata Prasad." The learned Judge also found that this examination, comparison, and acknowledgment of the debt due by the Sheoambar-Ram Narain firm to the plaintiffs, was effected by this Mata Prasad in the ordinary course of the partnership business of that firm. He found that Durga Prasad had similarly signed for the firm and made acknowledgments for the firm on other occasions. He held that Durga Prasad by his

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conduct indicated that he had authority to act as the agent of his partner, Mata Prasad, and similarly Mata Prasad had authority to act as the agent of his partner Durga Prasad. In other words, the learned Judge found that the acknowledgment and signature of this entry was a transaction such as is contemplated in s. 251 of the Indian Contract Act. Having found these facts, the learned Judge would have proceeded to give the plaintiffs the relief they claimed against Durga Prasad, if he had not conceived that he was precluded by the terms of s. 21 of the Indian Limitation Act, from giving effect to the acknowledgment against Durga Prasad. We think that in this point the learned District Judge was wrong. The section in question is as follows :—

"Nothing in ss. 19 and 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them."

Apparently the Court below reads this section as if the word "only" did not stand in it—that is to say, reads the section as prescribing that nothing in ss. 19 and 20 would render a written acknowledgment of one joint contractor an acknowledgment on behalf of his brother contractors. But the word "only" is not to be treated as surplusage. The meaning of the word "only" in that section, in our opinion, is that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partners, unless also it can be shown that he had power to bind that partner for the purpose of making such an acknowledgment, and in effect purported so to bind him. This view of the section has been taken in the ruling of *Premji Ludha* v. *Dossa Doongersey* (1), and is in conformity with the law laid down in similar cases by the English Courts. It appears to us, that upon the finding of the learned District Judge, Mata Prasad was competent to acknowledge the balance, not only for himself, but for his partner, and that he did do so when he wrote the words "Pus badi 15, sambat 1940, balance of Rs. 1,086-9-0, signed by Sheoambar-Ram Narain, compared and found correct by pen of Mata Prasad."

(1) I. L. R., 10, Bom., 358.

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This being so, the decree of the Court below was wrong, and the appellants should have obtained the relief they sought, not only against Mata Prasad, but against his deceased partner Durga Prasad. We set aside the decree of the Court below and decree the plaintiffs' claim and also this appeal with costs.

Appeal decreed.

1888
April 25.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MULCHAND AND ANOTHER (DEFENDANTS) *v.* MADHO RAM (PLAINTIFF).*

Evidence—Exclusion of evidence of oral agreement—Act I of 1872 *(Evidence Act), s.* 92—"*Between the parties.*"

The words in s. 92 of the Evidence Act (I of 1872) "between the parties to any such instrument" refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favor a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related.

M. conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed. *Held* that s. 92 of the Evidence Act will not preclude plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers.

THE facts of this case were as follow:—On the 13th March, 1877, a deed of sale of certain houses and other premises was executed by one Murlidhar, and purported to be in favour of two brothers, named Ganga Prasad and Mulchand, jointly, for Rs. 1,000. The deed was registered on the 14th March, 1877, and one of the endorsements made at the time of registration set forth that Murlidhar, the vendor, acknowledged that Rs. 200 had been previously paid, and that the balance of Rs. 800 had now been paid to him, before the Sub-Registrar, by both Ganga Parsad and Mulchand.

On the 6th January, 1886, the present suit was brought by Ganga Prasad against Mulchand, the plaintiff, praying in substance

* Second Appeal No. 2151 of 1886 from a decree of C. W. P. Watts, Esq., District Judge of Moradabad, dated the 6th August, 1886, confirming a decree of Maulvi Ain-ul-Abdin Khan, Subordinate Judge of Moradabad, dated the 23rd March, 1886.

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for a declaration that he alone was the real purchaser from Murlidhar under the deed of the 13th March, 1877, and for the ejectment of Mulchand and his son Babu Ram from a portion of the premises of which they had some years previously obtained possession by his license, but to which they now asserted a proprietary title. The plaintiff alleged that although Mulchand's name also was entered in the deed, the whole of the purchase-money had come out of his (the plaintiff's) pocket; that he alone had for some time subsequent to the sale been in possession of the property in suit; that he had subsequently lent a sitting-room to the defendants, and that when he asked them to vacate it for the purpose of having certain part of the premises rebuilt, they refused to do so, and obstructed him in the rebuilding. In defence, the defendants pleaded that Mulchand was in fact, and not merely nominally, a purchaser under the deed of the 13th March, 1877, that he had paid Rs. 500 of the purchase-money out of his own pocket, and that he had been in proprietary possession of the premises in his occupation from the date of purchase. Pending the suit the plaintiff died, and his son Madho Ram was brought on the record in his place.

The Court of first instance (Subordinate Judge of Moradabad) found that the plaintiff's allegations were established by the evidence, and decreed the claim. On appeal, the District Judge of Moradabad affirmed the Subordinate Judge's decree, relying mainly if not wholly upon the fact, which he apparently held to be established, that the plaintiff had paid the whole amount of the consideration for the sale.

From the lower appellate Court's decree the defendants appealed to the High Court.

Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

BRODHURST and TYRRELL, JJ.—We had heard this appeal out on the merits on both sides, and were proceeding to remand some issues or questions of fact to the lower appellate Court, which had determined the single question of payment of the sale price only, when a legal plea in bar of the action was raised by the learned

vakil for the defendants. It is based on the rule of s. 92 of the Indian Evidence Act, which excludes evidence of an oral agreement as between the parties to any instrument of the kind contemplated in that section, for the purpose of contradicting, varying, adding to, or subtracting from its terms. It was contended that the inquiries which we propose to make will involve the consideration of oral evidence, which may have the effect of varying the terms of the sale-deed under which the plaintiff and defendants jointly acquired the premises in suit. We heard argument and gave careful consideration to this proposition, and we have had the advantage of conferring with the learned Chief Justice and our brother Straight on the point. We are of opinion that the answer to the learned Pandit's contention is to be found in the proper interpretation of the phrase, "as between the parties to any such instruments," the words "the parties" being rightly read to imply the persons who on one side and on the other came together to make the contract. In the case before us, the "parties" in this sense would be the vendor on the one part and the two vendees on the other part. "As between" the vendor and themselves, neither of the vendees would be heard to plead, or would be allowed to offer, oral evidence to show that both were not parties to the buying of his house. Neither vendees could resist the vendor's claim for the price, or for any other relief properly arising to him out of the contract, on a plea intended to show that one of the two was a nominal party only to the contract. Similarly one of the several obligors of a bond or bill of exchange would not be allowed in answer to the obligee's action on the joint instrument to maintain a plea that he was a surety only; except of course in a case where a money-lender made advances on the security of a joint and separate note, being well aware at the time that one of its makers was a surety only. In such a case, notwithstanding the form of the note, the surety has been allowed to plead, as an equitable defence and prove that he was known by the lender to be a surety when the note was made, and that without his consent, the principal had had time given to him by the lender. (See the cases cited in note 6, para. 1054, p. 1004, Taylor on Evidence vol., ii, ed. 1872.) Such a case as this would fall probably under proviso 1 to s. 92. But on the other hand, we think that this section would not apply to

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questions, like that of the present case, raised by the parties on one side *inter se*, and not affecting the other party to the contract, touching their relations to each other in the transaction. The evidence in this respect would be offered not to vary, contradict, add to or subtract from the terms of the vendees' joint liability under the contract of purchase and sale from their vendor, but only to show *as between themselves*, the two vendees to wit, which was the real purchaser, or rather whether Mulchand was not the trustee only of his brother Ganga Prasad. Analogously in the case of the promisors of a joint note, it is competent to one of them, who has had to pay the entire debt, to show in variation of the terms of the note, as against a co-promisor, that the payer was a surety only, and proving this to get a decree for indemnification against his co-promisor. If we were to give to the terms of s. 92 a more extended interpretation, and to read them as excluding the admission of oral evidence to vary the terms of an instrument as between the parties *on one side only* thereto, as much and in the same way as the section certainly excludes the admission of such evidence as between the parties on both sides to the instrument, we should have, we fear, to close our Courts to many applications, no matter how justly founded, for equitable relief in cases such as we noticed passingly above: cases between co-promisors, co-obligors, co-debtors of accommodation bills, and the like, in which our Courts daily interfere to relieve parties in variation or even in contradiction of the written terms of an instrument of contract, to which they were parties on the one side together.

Taking this view, we over-rule the contention of the appellants on this point, and we must dispose of the appeal of Mulchand on the merits. The Court of first instance on a review of all the evidence found, that he was not a real but was a nominal party only to the purchase of the house property in question, and it gave the plaintiff a decree. The lower appellate Court confirming this decision, has left several important issues undetermined. It has decided in uncertain terms, and on somewhat inconclusive grounds, that the sale price, Rs. 800, was found by Ganga Prasad, no part of the fund having been contributed, at the time of the sale at least, by Mulchand. But obviously this finding does not conclude the question. The brothers were apparently joint purchasers,

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with joint interests, and the payment by one may have been for both, or may have been open to subsequent adjustment *inter se*. To enable us to decide whether Mulchand was a substantial party to the purchase or nominal only, whether he stands in the sale-deed as a beneficial owner, or merely as a trustee for Ganga Prasad, we must have findings on certain other questions, namely :—

1. If Mulchand had no substantial interest in the contract, why was he associated with Ganga Prasad, in the making, execution, and registration thereof?

2. At the date of the contract, were Ganga Prasad and Mulchand associated as joint in any respect, in living, in estate, or in particular business?

3. When did Mulchand get possession of any part of the premises?

4. In what way did he enter?

(*a*) By right in the ordinary course of things as beneficially interested?

(*b*) By license of Ganga Prasad or by trespass?

Ten days will be allowed for objections.

Issues remitted.

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July 2.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

DAWAN SINGH (DEFENDANT) *v.* MAHIP SINGH (PLAINTIFF).*

Defamation—Personal insult—Cause of action—Verbal abuse—special damage—Witness—Privilege.

The plaintiff was cited as a witness by one S. in a suit instituted by him against defendant. After plaintiff's evidence had been concluded, in which he stated that there was no enmity between him and defendant; the defendant was examined by the Court, and stated that there was enmity between him and plaintiff, and on the Court inquiring to know what was the cause of enmity, defendant used words conveying the meaning that plaintiff's descent was illegitimate.

Held by Brodhurst, J., that, under the circumstances, the statement complained of was made by defendant while deposing in the witness-box, and therefore absolutely privileged.

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* First Appeal No. 2 of 1888 from an order of Maulvi Mohamed Said Khan, Subordinate Judge of Jaunpur, dated the 13th December, 1887.

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Per Mahmood, J. (*contra*), that the question whether or not the statement complained of was made by defendant in course of his deposition, or after it was finished and when he was no longer in the witness-box, has not been tried, and the order remanding the case for trial on the merits was right.

Further, that the English law of slander as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage, is not applicable to this country, either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India.

That whilst the English law of defamation recognises no distinction between defamation as such and personal insult in civil liability, the law of British India recognises personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage.

That such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury, apart from defamation, and that malice is an element of liability for abusive and insulting language, and that such malice will be presumed or inferred, unless the contrary is shown.

That when the defendant is not absolutely privileged and protected by reason of the office or occasion on which he employed such language, he renders himself subject to a civil liability for damage, irrespective of any plea of justification based upon proving the truth of the statements contained in the abusive and insulting language complained of.

That the rule of English law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insulting and abusive language used by such witness; and such statements when made in the witness-box are privileged and protected, even though made maliciously and falsely, so long as they are relevant to the inquiry in the broadest sense of the phrase.

That even where such statements have no reference to the inquiry, the defendant may prove the absence of malice and that they were made in good faith for the public good.

The following cases were referred to in the judgments—*Scott* v. *Stansfield* (1), *Munster* v. *Lamb* (2), *Mackay* v. *Ford* (3), *Seaman* v. *Netherclift* (4), *Dawkins* v. *Rokeby* (5), *Henderson* v. *Broomhead* (6), *Srikant Roy* v. *Satcori Shaha* (7), *Ibn Husain* v. *Haidar* (8), *Parvati* v. *Mannar* (9), *Roberts* v. *Roberts* (10), *Lynch* v. *Knight* (11), *Abdul Hakim* v. *Tej Chunder Mukarji* (12), *Sri Raja Sitarama Krishna Rayadappa Ranga Rao Bahadur Garu* v. *Sri Raja Sanyasi Razu Pedda Baliyara Simhulu Bahadur Garu* (13), *Oudai* v. *Bhowanee Pershad*

(1) L. R. 3 Ex. 220.
(2) L. R. 11 Q. B. D. 588.
(3) 20 L. J. Ex. 404.
(4) L. R. 2 C. P. D. 53.
(5) L. R. 7 H. L. 744.
(6) 28 L. J. Ex. 360.
(7) 3 C. L. R. 181.
(8) I. L. R. 12 Calc. 109.
(9) I. L. R. 8. Mad. 175.
(10) 33 L. J. Q. B. 248.
(11) 9 H. L. Cas. 577.
(12) I. L. R. 3 All. 815.
(13) 3 Mad. H. C. Rep., p. 4.

(1), *Subbaiyar* v. *Kristnaiyar* (2), *Pitamber Dass* v. *Dwarka Pershad* (3,) *Queen-Empress* v. *Dhum Singh* (4).

ONE Sheobadan Singh had instituted a suit in the Court of the City Munsif of Jaunpur against defendant and cited plaintiff as a witness. Plaintiff's evidence was taken on the 10th May, 1887, and he concluded it by deposing that there was no ill-feeling between him and defendant. Thereupon the Munsif examined the defendant, who stated that there was enmity between him and plaintiff in respect to eating and drinking, and in explanation thereof he stated, referring to plaintiff:—"*Iske ma bap me farq hai; aur is wajeh se khana pina nahi hai.*"

In consequence of these words plaintiff instituted this suit, alleging that on 10th May, 1887, while he was giving evidence in the above case, "defendant abused him, making inputations ppon his mother; that the abuse caused great insult to him and he suffered much mentally and there was loss of respect amongst the brotherhood."

Defendant denied using any abusive language and averred that, in reply to a question asked by the Court, he made a statement explaining why he had ceased to eat with plaintiff, and why there consequently was enmity between him and the plaintiff. Munsif framed three issues, *viz.*:—

(1) Whether defendant abused the plaintiff, and if so, whether a suit would lie for slander.

(2) Whether the imputation was as a matter of fact true, and,

(3) What ought to be the measure of damages.

Then examining the parties and without taking any evidence in the case he recorded the following judgment dismissing the suit:—"I took down the statement on oath of the plaintiff. He stated in his cross-examination that when Dawan Singh, defendant, was being examined by this Court in the former case he was questioned by the Munsif Saheb 'Then what was the reason that Mahip Singh came to swear against you? In answer he said—*Iske ma bap me farq hai; aur isse wajeh se khana pina nahin hai*'. Hence it is proved that defendant then was in the witness-box, and as such he was

(1) N.-W. P. H. C. Rep., 1866, p. 264.
(2) I. L. R. 1 Mad. 383.
(3) N.W. P. H. C. Rep., 1870, p. 435.
(4) I. L. R. 6 All., 220.

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bonâ fide answering a question put to him. I am therefore of opinion that he was privileged, and the suit does not lie, for statement of witnesses can never be the subject of an action."

The plaintiff in appeal contended that the abusive language used towards him was uttered by the defendant after his deposition had already been taken by the Court, and that abusive language insulting to him was actionable.

The Subordinate Judge, holding that the use of abusive language was actionable, and defendant made the statement complained of after his examination as a witness in the case had been over, remanded the case for trial on the points left undetermined by the Munsif. The defendant appealed.

Munshi *Kashi Prasad*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

BRODHURST, J.—In this case Mahip Singh, the plaintiff-respondent, stated in his plaint that one Sheobadan Singh had instituted a suit in the Court of the City Munsif of Jaunpur against Dawan Singh, the present defendant-appellant, and that in that suit Sheobadan Singh had cited him (Mahip Singh) as a witness; that on the 10th May, 1887, whilst he was being examined as a witness before the Munsif, Dawan Singh abused him, making imputations against his mother, whereby he (Mahip Singh) was greatly defamed, was subjected to mental pain, and suffered loss of honour and of respect among his equals, and he therefore prayed that, with reference to the defendant's means, a decree might be passed in favour of him, (the plaintiff), against the defendant for Rs. 300, with costs.

Dawan Singh, in his written statement, denied that he had used any abusive language and averred that he had, in reply to a question asked by the Court, made a statement explaining why he had ceased to eat with Mahip Singh, and why there consequently was enmity between Mahip Singh and himself.

The Munsif recorded the deposition of each of the parties.

Mahip Singh stated:—'The defendant abused me whereby I was dishonoured among the members of my brotherhood. As I was considered before the defendant abused me, so am I now also

considered; no loss has occurred in this respect. He abused me, imputing bad conduct to my mother. At the time of giving evidence on a question asked by the then Munsif, the defendant gave abuse to me. On the deposition being concluded the Munsif asked Dawan Singh the question, 'What is the reason that so respectable a man (as the witness Mahip Singh) came to tell a lie," and thereupon Dawan Singh uttered abuse. He said:—'Mahip Singh *ke ma bap men farq hai; isse wajeh se khana pina nahin hai.*'"

Dawan Singh deposed:—"I was being examined in my case, in which the plaintiff had come to give evidence on behalf of my opponent. I told the Munsif that there existed enmity between Mahip Singh and myself. The Munsif asked me,—'What is the enmity?' I replied: There is enmity between myself and Mahip Singh in respect to eating and drinking. The Munsif again asked 'What is the enmity and why has eating and drinking (together) ceased?' Thereupon I replied that food and drink were forsaken on account of Mahip Singh's mother."

Of three issues framed by the Munsif, the first and the only one that need be specially referred to is,—"Did the defendant abuse the plaintiff, and if he did, does the suit lie for slander?"

The Munsif recorded the following judgment:—

"*Issue* I.—I took down the statement on oath of the plaintiff. He stated in his cross-examination that when Dawan Singh, defendant, was being examined by this Court in the former case, he was questioned by the Munsif Saheb—'Then what was the reason that Mahip Singh came to swear against you?' In answer he said: '*Iske ma bap men farq hai; aur isse wajeh se khana pina nahin hai.*' Hence it is proved that the defendant then was in the witness-box, and, as such, he was *bonâ fide* answering a question put to him. I am therefore of opinion that he was privileged and the suit does not lie, for statements of witnesses can never be the subject of an action (*vide* para. 2, p. 117, Underhill's Torts). There are many cases in Addison's Torts. The plaintiff's pleader quoted I. L. R. 12, Calc., 109. That ruling has no bearing upon this case, for here the defendant was in the witness-box, whereas in the case cited the defendant abused when the plaintiff was in a *mandir* or temple, and so on. I need not, therefore, enter into the merits of the other issues.

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"It is therefore ordered that the plaintiff's suit be dismissed with costs. He is to bear his own costs."

From this judgment the plaintiff preferred an appeal. The appeal was disposed of by the Subordinate Judge. He framed the following issues :—

1. Is abuse actionable?

2. Was the defendant privileged in uttering it?

And in his judgment the Subordinate Judge observed: "On the first point I find that abuse in this country is certainly actionable. A suit for damages can be preferred against the persons who take so much liberty in Court without any provocation. The defendant pleads that he was privileged in doing so. He was bound to produce a copy of his deposition in support of his contention that he had used abuse while he was standing in the witness-box and answering questions put to him, of this there being no iota of evidence. The plaintiff, in his deposition, has plainly stated that he was abused after the defendant's deposition was over. If this is a fact, and probably it is so in absence of any evidence to the contrary, then, in my opinion, he had no right to use the ill expression towards the plaintiff, a respectable person in his retired life. The Court of first instance has misconstrued his deposition, in which he stated that after the deposition of the defendant, in answer to the question put to him by the Court, and not during the course of his examination in the witness-box, he was abused. The privilege of a witness lasts so long only as he is deposing on oath in the witness-box, but not after it."

With reference to these remarks the Subordinate Judge allowed the appeal and remanded the case to the first Court, under s. 562 of the Civil Procedure Code, for re-trial on the merits.

The pleas taken before us in second appeal are :—

(1) Because the Court below has erred in ruling that abuse is actionable.

(2) Because the learned Subordinate Judge has misconstrued the respondant's deposition, which, taken as a whole, fails to disclose any cause of action.

(3) Because the statement was admittedly made in answer to a question put by the Court.

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The suit, as shown by the plaint, was brought merely with reference to statements made by Dawan Singh on the 10th May, 1887, in the Court of the City Munsif of Jaunpur. We have called for the former record and have examined it. The deposition of Dawan Singh does not contain any question or answer as referred to above and as admitted by both the parties to this suit. The evidence of Mahip Singh, however, is concluded with the following remarks:—'There is no dispute between me and Dawan Singh."

This tends to show that ill-feeling between Mahip Singh and Dawan Singh had been alleged, and it affords corroboration to the statements of the parties.

The whole of the parol evidence was recorded on the 10th May, 1887, and in the following order:—

Plaintiff's witnesses.
Mahip Singh.
Dhan Lal Dubey.

Defendant's witnesses.
Jugrup Dasondhi.
Debi Dayal Singh.

Persons examined by the Court.
Dawan Singh, defendant.
Sheobadan Singh, plaintiff.

Not only was Dawan Singh examined in compliance with the order of the Munsif, but his evidence, as recorded in the vernacular, clearly shows that he was certainly twice called up and examined by the Munsif on the 10th May, 1887.

It was optional with the Munsif to re-examine Dawan Singh as often as he thought necessary whilst Dawan Singh was in Court and the suit was pending.

It will be noticed that Mahip Singh's evidence was recorded first of all and that of Dawan Singh last but one. From the concurrent statements of the parties to this suit there is not, I think, any room for doubt that the Munsif, after having recorded the evidence of Dawan Singh as shown in the vernacular record, asked him why Mahip Singh had given evidence against him, and that, in reply to the Munsif's question, Dawan Singh stated that

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there was enmity between them, and when pressed by the Munsif to explain the cause of enmity, answered that there was enmity in respect to eating and drinking, and on being further pressed to explain what the reason for discontinuing eating and drinking together was, he replied, "*Iske ma bap men farq hai, aur isse wajeh se khana pina nahin hai*," which no doubt means there is a difference (of caste) between his father and mother, and on this account there is no eating and drinking ('together between him and myself').

I see no reason to think that Dawan Singh would have made use of the expressions taken objection to had he not been required to reply to questions put to him by the presiding Munsif. It is not Dawan Singh's fault that the Munsif asked him those questions and did not record the questions he put and the answers he received.

That such questions were asked of Dawan Singh by the Munsif is proved by the statements of both parties, and to punish Dawan Singh because the Munsif omitted to record the questions would be most inequitable.

Dawan Singh is a mere cultivator. Apparently he replied to the Munsif's questions on the spur of the moment. In doing so he did not make use of any coarse expression, and, in fact, it would be almost impossible for any witness who, in answer to questions put to him by the presiding Judge, thought himself called upon to state that another witness, referred to by the Judge, was illegitimate, to convey his meaning in more delicate language than was used for that purpose by this illiterate peasant.

When the Munsif asked the questions of Dawan Singh, he doubtless did not expect to elicit the answer he finally received; and when that answer was given, the Munsif may, not unnaturally, have thought that all the questions and answers on that point had better be omitted from the record.

Witness-boxes are not amongst the articles of furniture supplied to our Civil Courts, but when a witness, after having been duly sworn, is during the pendency of the suit being examined or re-examined in Court, either by counsel, by vakil, or by the presiding Judge, he is, in the "witness-box" within the ordinary acceptation of the phrase, and, with reference to what I have above written, I have no hesitation in holding that Dawan Singh at the time he

answered the questions put to him by the Munsif, was in the "witness-box."

The only point now remaining for consideration is whether, under the circumstances I have mentioned, Dawan Singh, in deposing as he admits he did, was privileged or not.

In *Seaman* v. *Netherclift* (1) the head-note is as follows:—

"A witness in a Court of justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness.

"A statement as to another matter, made to justify the witness in consequence of a question going to the witness's credit, has reference to the enquiry within the above rule.

"Defendant, an expert in hand-writing, gave evidence in the trial of *D.* v. *M.* that, in his opinion, the signature to the will in question was a forgery. The jury found in favour of the will, and the presiding Judge made some very disparaging remarks on defendant's evidence. Soon afterwards defendant was called as a witness in favour of the genuineness of a document, on a charge of forgery before a Magistrate. In cross-examination he was asked whether he had given evidence in the suit of *D.* v. *M.* and whether he had read the Judge's remarks on his evidence. He answered 'yes'; counsel asked no more questions, and defendant insisted on adding, though told by the Magistrate not to make any further statement as to *D.* v. *M.*, 'I believe that will to be a rank forgery, and shall believe so to the day of my death.'

"An action of slander having been brought by one of the attesting witnesses to the will:—

"Held, that the words were spoken by defendant as a witness and had reference to the inquiry before the Magistrate, as they tended to justify the defendant, whose credit as a witness had been impugned, and that the defendant was absolutely privileged."

Cockburn, C. J., observed: "If there is anything as to which the authority is overwhelming, it is that a witness is privileged to the extent of what he says in the course of his examination. Neither is that privilege affected by the relevancy or irrelevancy

(1) L. R. 2. C. P. D. 53.

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of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that beyond all question this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins* v. *Lord Rokeby* (1), after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the inquiry is privileged, notwithstanding it may be malicious, and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different."

With reference to the circumstances of this case and to the above ruling, I am of opinion that Dawan Singh was absolutely privileged in making the statements that he admittedly did make when he was examined as a witness in the Court of the City Munsif of Jaunpur.

I would therefore allow the appeal, reverse the judgment of the lower appellate Court, and restore the decree of the first Court dismissing the suit, and I would further order that all costs should be borne by the plaintiff-respondent.

MAHMOOD, J.—The plaintiff in this case came into Court alleging what has been briefly stated by the Munsif in this case in the following words:—

"That the plaintiff is a respectable person and was in the service of the Government. Sheobadan Singh had brought a suit against the defendant in this court, and in that case Sheobadan had cited the plaintiff (present) as his witness; that on the 10th May, 1887, the plaintiff was giving his deposition when the defendant abused him, making imputations upon his mother; that the abuse caused great insult to him and he suffered much mentally, and there was loss of respect amongst the brotherhood: hence the suit."

The learned Judge of the lower appellate Court in describing the suit has stated it to be one "for recovery of Rs. 300, the compensation of pain to plaintiff's soul and defamation," by which

(1) L. R. 7. H. L. 144.

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terms I understand that the action is one *ex delicto* for recovery of damages arising out of the action of the defendant in having used insulting expressions on the 10th May, 1887. The expressions then used were, as stated in the judgment of the first Court, that, with reference to the plaintiff, the defendant said : "*Iske ma bap men farq hai ; aur isse wajeh se khana pina nahin hai,*" which, as interpreted in English, means that the plaintiff's descent was illegitimate, and that he was therefore out of caste. This language was used in open Court and in answer to a question put to the defendant by the Court itself.

It does not appear that in the suit brought by Sheobadan Singh against the defendant Dawan Singh any question as to the legitimacy or illegitimacy of the plaintiff, or as to his being in or out of caste was a matter in issue, or otherwise relevant in the strict sense of the law of evidence, and indeed Mr. *Kashi Prasad*, who appears for the defendant in this Court, has conceded that the language was in its signification abusive, and that the grounds upon which it would not furnish a cause of action for a suit such as this would be only two—the *first* being that no special damage having accrued to the plaintiff by reason of the abusive language having been used, no action would lie ; and, *secondly*, that even if the language by itself were to be taken as abusive and actionable, it was privileged and such as would not furnish a cause of action for recovery of damages in a suit such as this.

It is not disputed that the language, taken in its ordinary Hindustani meaning, was abusive, and, as such, calculated to hurt the feelings of the plaintiff, to lower him in the estimation of his fellow-castemen, and such as might involve his being out-casted, if these statements were believed.

The defence set up is represented by the Munsif in the following words :—

"The defendant contends that he did not abuse the plaintiff ; that the plaintiff had deposed that he could not eat with the defendant, whereupon the defendant had thrown some hints about its cause ; that the suit cannot lie for slander ; that the plaintiff has inflated his status : he is a cultivator and a pensioner."

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Upon this state of the pleadings the Munsif as the Court of first instance framed three issues, the *first* being whether the defendant abused the plaintiff, and if so, whether a suit would lie for slander; the *second* issue was whether the imputation was, as a matter of fact, true, and the *third* issue related to the measure of damages.

The Munsif however, after examining the parties, did not take evidence upon the issues, but held that the statement was made in the witness-box, and that the defendant "was *bonâ fide* answering a question put to him," and, as such, was not liable to the action, because such statement was privileged. In holding this view the Munsif has relied upon the cases cited at page 117 of Underhill's Law of Torts, where the summary of the cases is to the effect that "statements of a Judge acting judicially, whether relevant or not, are absolutely privileged: *Scott* v. *Stansfield* (1); and so are those of counsel, however irrelevant and however malicious: *Munster* v. *Lamb* (2). Solicitors acting as advocates have a like privilege: *ibid*, and *Mackay* v. *Ford* (3). Statement of witnesses can never be the subject of an action: *Seaman* v. *Netherclift* (4); and a military man giving evidence before a military Court of enquiry, which has not power to administer an oath, is entitled to the same protection as that enjoyed by a witness under examination in a Court of justice: *Dawkins* v. *Rokeby* (5). If the evidence is false, the remedy is by indictment: *Henderson* v. *Broomhead* (6)." The Munsif has also relied upon the English Law of Torts as contained in the work of Addison on that subject.

Upon this ground of law alone the Munsif, without entering into the merits of the case or taking any evidence in it other than the statements of the parties, dismissed the suit; but upon appeal the learned Judge of the lower appellate Court, reversing that order, has remanded the case for trial under s. 562 of the Civil Procedure Code. The view taken by the learned Judge of the lower appellate Court seems to be based upon two propositions, one being that the abusive language used by the defendant was in itself actionable without proof of special or actual damage; and the other that the defendant could not be held to be privileged in making the statement which he did make. In remanding the case, the learned

(1) L. R. 3 Ex. 220.
(2) L. R. 11 Q. B. D. 588.
(3) 20 L. J. Ex. 404.
(4) L. R. 2 C. P. D. 53.
(5) L. R. 7 H. L. 744.
(6) 28 L. J. Ex. 360.

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Judge of the lower appellate Court was inclined to hold that the abusive language used by the defendant towards the plaintiff was uttered after the defendant's deposition had already been taken in the Court, and the learned Judge goes on to say : "The privilege of a witness lasts so long only as he has been deposing on oath in the witness-box, but not after it."

Holding this view, the learned Judge was of opinion that this particular point as to whether or not the use of abusive language above mentioned was made under circumstances of privilege had not been duly dealt with by the first Court on evidence, as no evidence on the issue had duly been taken. And the remand proceeds upon that hypothesis.

What we have to determine in this case are two important questions of law :—

The *first* is whether abusive language which aims at insulting a person is not *per se* actionable in tort under the law of British India (when the language is such that it causes injury to the feelings of the person towards whom it is used), without proof of any special or actual damage.

The *second* question is, whether under the circumstances of this case the words used by the defendant were such as can be held to be privileged by any rule prevailing in this country as a rule of law.

Upon the first of these points Mr. *Kashi Prasad*, in arguing the case for the appellant, has relied upon the authority of English cases as they are represented in the latest edition of Addison on Torts, the general effect of which cases is that abusive language is not *per se* actionable, unless it falls within certain limitations imposed by the common law of England. Indeed, all that Mr. *Kashi Prasad* relies upon is best formulated in Folkard's Treatise (1) and in the most recent work upon the law of tort by Mr. Frederick Pollock at page 206 of his work, where the law of England, as it now stands, is laid down in the following words :—

"Slander is an actionable wrong when special damage can be shown to have followed from the utterance of the words complained of, and also in the following cases :

"Where the words impute a criminal offence.

(1) Starkie's Law of Slander and Libel, by Folkard, 4th ed. 70.

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"Where they impute having a contagious disease which would cause the person having it to be excluded from society.

"Where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession, or trade, in short, where they manifestly tend to prejudice a man in his calling."

Relying upon the authority of English law, the learned pleader argues that, inasmuch as in this case no special damage is either alleged in the plaint or proved, the action was in itself not maintainable, because it did not furnish sufficient elements for a cause of action in tort. I have no doubt that the learned pleader is perfectly right so far as the English law of torts is concerned upon this particular point, and that if the suit had to be dealt with by me as a Judge sitting in England, I should have accepted his contention and decreed this appeal, the effect of which would be to dismiss the suit. But the matter, in my opinion, does not rest upon the exact position taken up by either the common law of England or the cases decided there. There is no authority with which I am acquainted which entitles any Court of justice sitting here in India to apply the English common law to the lives and liberties of the people of this country, irrespective of statutory provisions and of the rule of "justice, equity and good conscience," where no statutory provisions are available. There is no statute which renders that law applicable to this country, and if difficulties arise in dealing with questions such as those with which we have to deal in this case, it is because the Legislature has not yet thought fit to frame any special rules which would govern actions of this character. And further difficulty which arises in such cases is what, in the absence of statutory provisions, should be the line of action upon which the Courts of justice should proceed in British India. Speaking for myself, I am perfectly willing, sitting here as one of Her Majesty's Judges, to take the responsibility of saying that for the purpose of deciding such questions which affect a population vastly different to that of England in nationality, creed, and social conditions, the English common law, though it must always be referred to for guidance in questions of difficulty and regarded with respect, is not necessarily fit to be adopted in its integrity, irrespective of the conditions of this country. These,

however, are views which affect the Legislature more than the Bench, and holding as I do that the law of British India upon this particular point is silent so far as legislative enactments are concerned, I proceed to state, or rather repeat what I have said before now as to what should be the rule in determining such questions when they arise for adjudication.

There is, indeed, a series of decisions to be found in the published reports upon the subject, but they are so silent as to general principles and so conflicting with each other that I cannot accept them to represent any defined rule of the common law of India. The state of the present law and my views thereupon are represented in what I have before now said elsewhere in the following words:—

"Defamation, as representing slander and libel consolidated, is an offence against reputation only, and, therefore, as the English law now stands, publication to a third person or persons is a condition precedent to its being regarded as actionable wrong; so that insulting words of however grave a nature, when addressed only to the plaintiff, do not amount to a tort, even though the insult be directly followed by mental distress or vexation leading to inability to attend to one's ordinary avocations of life. Again, even where insulting words are orally uttered in public, proof of special or actual damage is necessary, except in certain well-defined cases, to render them actionable. An 'imputation, for example, by words however gross and on an occasion however public, on the chastity of a modest matron or a pure virgin is not actionable, without proof that it has actually produced special temporal damage to her; neither it is actionable to call a man a swindler or a cheat, a blackguard or a rogue, or to say that he is a low fellow, a disgrace to the town, and unfit for decent society, unless it can be proved that actual legal damage has resulted to the plaintiff from the slander' (Addison on Torts p. 37).

"The truth seems to be that the English law of tort, whilst attaching considerable importance to physical injuries and to matters which result in pecuniary loss, does not attach sufficient significance to mental distress, and does not, therefore, afford sufficient protection against personal insult as distinguished from

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bodily injury and defamation. It is a question of no small consequence whether this characteristic of the English system should be introduced in India. I use the word "introduced," because, as the case-law now stands, the weight of authority is undoubtedly in favour of recognising mental distress caused by insulting words as in itself actionable, irrespective of special or actual damage. The following rulings of the Calcutta High Court are authorities for this proposition :—

(1) *Kanoo Mundul* v. *Rahumoodlah Mundul*.

(2) *Moulvie Ghulam Hossein, Vakeel*, v. *Hur Gobind Doss, Tushildar*.

(3) *Shaikh Tukee* v. *Shaikh Khoshadel Biswas*.

(4) *Osseemooddeen* v. *Fateh Mahomed*.

(5) *Gour Chander Puteetundee* v. *A. L. Clay*.

(6) *Sreenath Mookerjee* v. *Komol Kurmokar*.

(7) *Kalee Coomar Mitter* v. *Ramguttee Bhuttacharjee*.

"The reports of these various cases are not very complete, but so far as they go they leave no doubt that injury to feelings has been held as sufficient in itself to constitute a cause of action for recovery of damages, regardless of actual loss or harm. In the first of these cases, Norman, C. J., observing that 'the words, which are of the coarsest abuse, do undoubtedly impute that to the plaintiff which would, if believed, have been hurtful to the feelings of his family and have lowered his character in respect of his caste,' goes on to say : 'No doubt, actions for slander are often vexatious. But to prevent people from taking the law into their own hands, and for the preservation of peace and order, it is a matter of the greatest importance that Courts of justice should afford an effectual remedy to persons feeling themselves aggrieved by wanton and virulent abuse.' In the second and the third cases it was held that actual injury and damage was not necessary to render the action maintainable, and it was observed in the latter case that

(1) W. R., January to July, 1864, p. 269.
(2) 1 W. R. 19.
(3) 6 W. R. 151.
(4) 7 W. R. 259.
(5) 8 W. R. 256.
(6) 16 W. R. 83.
(7) 16 W. R. 84, note.

'injury might result to a man's feelings such as would entitle him to damages' and the same view was adopted in the fourth case. These rulings were followed in the fifth case, where it was observed that 'it does not follow that because a man's professional position or gains are not injured by abuse received by him that his feelings are not injured and outraged.' Again, in the sixth and the seventh cases similar rules were laid down, mental distress being taken to be a sufficient cause of action. Similarly, the Bombay High Court in *Kashi Ram* v. *Bhadu Bapuji* (1), after stating that the English law upon the subject was different, adopted the view of the Calcutta High Court, as the suit was brought in the mufassal and the parties to it were Hindus.

"In none of these cases does it appear that the question of publication was raised or determined, and injury to feelings seems to have been regarded as the sole ground of action. On the other hand in *Phoolbasee Koer* v. *Barjun Singh* (2) *and Chundarnath Dhur* v. *Issurree Dassee* (3) the Calcutta High Court, without noticing any of its previous rulings, laid down the rule that abusive and threatening language without proof of actual damage did not constitute a cause of action at all for recovery of damages. Again, a learned Judge of the same Court (Pontifex, J.) in *Nilmadhub Mookerjee* v. *Dookeeram Khottah* (4) observed that 'actions for verbal slander ought not, in my opinion, to be encouraged, and that, unless there are special damages proved, the Court will be very reluctant to give any damages.'

"It can scarcely be doubted that these various rulings leave the law in a very unsatisfactory condition and there is need for legislative interference. What form that interference should take is a question which, in my opinion, should be determined according to the conditions of life and the feelings of the people of India. And, looking at the matter from this point of view, I have no doubt that the seven rulings of the Calcutta High Court which I have enumerated above lay down the rule most suitable for India, though it is more in conformity with the Roman than the English law. There

(1) 7 Bom. H. C. Rep. p. 17, A. C.
(2) 12 W. R. 369.
(3) 18 W. R. 531.
(4) 15 B. L. R. 161.

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is a passage* in Starkie's *Law of Slander and Libel*, by Folkard, 4th ed., p. 19, which shows that even in Scotland anything defamatory is the foundation of an action without proof of special damage. The case of *Aitken* v. *Read* (1) is relied upon for this proposition, and it is stated that in the case of *Mackenzie* v. *Read* (2) the Court, after observing that the law on the subject of slander in England was very particularly defined, added that anything that *produces uneasiness of mind is* actionable in Scotland.

"I confess I can see no reason why personal insult and consequent mental distress should not be recognised as constituting a substantive cause of action in our proposed law of torts. In enumerating personal rights the Civil Code of New York (s. 27) lays down that every person has 'the right of protection from bodily restraint or harm, from *personal insult*, from defamation, and from injury to his personal relations.' If, then, personal insult is a wrong as distinct from defamation as assault, there seems no reason why it should not be regarded as distinct tort. A tort is

* "Many incidents were founded on the doctrine of the Roman law, that contumely was the ground of action, in which it differs from the law of England. If an infant, or one in a state of intoxication, defamed another, the action failed, for the *mens rea*, the contumelious intention, was wanting; in England such a defence, if the act were voluntary, would be unavailable. By the Roman law, a party was not only entitled to sustain an action for contumelious words spoken concerning himself, but also in respect of those spoken of others of his family, if they tended collaterally to subject him to degradation and contempt. Thus, a father was entitled to recover, in respect of a contumelious injury offered to his wife, children, or domestics, provided the offender knew the relationship of the party so offended. So far was the principle carried by the Roman law, that even the heir was entitled to an action for an insult to the remains, or even the memory of the deceased. Et si forte cadaveri defuncti fit injuria cui hæredes bonorum possessores extitimus, injuriarum nostro nomine habemus actionem. Spectat enim ad existimationem nostram si quis ei fiat injuria. Idemque et *si fama ejus cui hæredes extitimus accesatur*. The same degree of indefiniteness which characterizes this branch of the Roman law naturally pervades, also, the codes of those nations which have adopted the principles of that law. In Scotland, for instance, the limits of civil as well as criminal liability are exceedingly wide. Thus, in the case of *Aitken* v. *Read and Fleming* (1), the Judge observed, 'There are disadvantages in allowing actions of this sort, where there is no accusation of a crime, or allegation of specific damage. By the law of Scotland, however, *anything defamatory* is the foundation of an action.' In the case of *Mackenzie* v. *Read* (2) the Court, after observing that the law on the subject of slander in England was very particularly defined, added, '*here* anything that *produces uneasiness of mind* is actionable.'"

(1) 2 Mur. Rep. 149. (2) Ibid, 159.

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only an injury to a legal right not arising out of contract between the wrong-doer and the person wronged; and, in my opinion, if the right of protection from personal insult is violated, such violation should be recognised as a cause of action for recovery of damages as much as assault. Such is apparently the rule of the Roman civil law and of the law of Scotland, both of which recognise mental distress as in itself constituting an injury. Moreover, the view which I have here ventured to express would, if adopted, be in keeping with the notion of injury as understood in the Indian Penal Code (s. 44), where it is taken to denote 'any harm whatever illegally caused to any person in body, *mind*, reputation or property.'

"The observations which I have ventured to make above do not, however, necessarily lead to the conclusion that anything should be added to the law of defamation in which the doctrine of publication to third persons naturally occupies an essentially important position. According to my view, the exigencies of the matter would be sufficiently met by adding '*personal insult*' as a distinct head under the category of personal wrongs, the question whether the insult is offered in public or in private being left to take its place as an element bearing upon the assessment of damages, as in cases of assault. The effect of this would, of course, be that personal insult would be a wrong in itself, irrespective of the question whether the abusive language is published or not and whether it is expressed orally or in writing. As an illustration of my meaning, two cases to be found in the Indian Reports may be referred to. In *Komul Chunder Bose* v. *Nobin Chunder Ghose* (1) Macpherson, J., held that a letter addressed to the plaintiff himself, though containing insulting and abusive language, did not constitute a cause of action in tort, because 'the only damage alleged is damage to the feelings of the plaintiff caused by the receipt of the letter' and 'such injury is not in itself a ground for giving damages in a civil action.' The ruling was followed by the Allahabad High Court in *Mahomed Ismail Khan* v. *Mahomed Tahir* (2) and is no doubt in conformity with the English law. In the latter of these cases I was myself engaged as counsel for the plaintiff, and I well remember how I failed to induce the Bench to

(1) 10 W. R. 184. (2) N. W. P. H. C. R. 1874, p. 38.

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depart from the rule of English law and to adopt the view that personal insult causing mental distress should in itself be recognised as actionable wrong in India, apart from the subject of defamation.

"The reasons ordinarily employed against this view are that 'abusive, insulting and unmannerly language which affects not a man's liberty or estate are of too indefinite and uncertain a character to be the subject of an action for pecuniary damages. Such injuries, rather affronts to the feelings, are as incapable of definition as they are of admeasurement. They depend upon the rank, situation and condition of the parties, and on circumstances which may be felt but not defined; they may depend on the tone of voice, the gestures, even looks by which they are accompanied, and, in some instances, silence may be more contemptuous and insulting than direct expressions' (Starkie, p. 17). It is submitted that these objections apply equally to almost all personal injuries (such as assault, defamation, false imprisonment, &c.) in which mental suffering is recognised as an element of assessing damages; so much so that there is no fixed rule for estimating damages in such cases, and the matter is usually left to the discretion of the jury with reference to the circumstances of aggravation or mitigation as the case may be. In India such questions would have to be decided by the Judge, and I can anticipate no impossibility in arriving at a fair assessment of damages in cases of personal insult as distinguished from defamation. The cases cited in Addison's Treatise (p. 151) show that the state of the English case-law as to what words are actionable is of a most unsatisfactory and contradictory nature; and judicial opinion seems to have wavered from time to time between discouraging actions for slander and favouring them. 'The opinions of later times,' observes Holt, C. J., 'have been in many instances different from those of former days in relation to action for words, and judgments have gone different ways; but, for my part, whenever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of peace.'

"If, then, rendering verbal slander actionable contributes to the preservation of the peace, the recognition of personal insult would

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a fortiori achieve a similar result. Defamation is an offence against reputation, having *falsehood or misrepresentation* as its instrument. Personal insult, on the other hand, would be an offence independent of the element of *misrepresentation*, the primary object of the offender being not injury to *reputation*, but the humiliation of his victim or injury to his *peace of mind*. This distinction, which does not seem to be clear in the English law, has probably gone far to throw *personal insult* into the background and to prevent its being recognised as a tort in itself. Thus a distinct wrong remained practically without a remedy: and Benthiam, in his Principles of Penal Law, Chap. XIV, has shown how the practice of duelling arose out of this circumstance. In India violent breach of the peace often results from abusive language; and, indeed, the Indian Penal Code (s. 504) recognises insult as a distinct offence from defamation (s. 499), provided that it is likely to cause breach of the peace. This limitation is no doubt suited to the genius of the criminal law, but why should this limitation be imposed upon *personal insult as a civil wrong*? Mr. Starkie, as usual with English text writers, does not recognise personal insult as a wrong distinct from defamation, and after stating that 'the only mode of proceeding in respect of mere abusive and unmannerly and insulting language is by causing the offender to be bound over to good behaviour,' goes on to say that 'it is expedient on principles of general policy and convenience that the law should define by sufficient limits, in what instances simple defamation unaccompanied by special damage should constitute a substantive ground of action.' But whatever limitations it may be expedient to impose upon defamation, it does not necessarily follow that those same limitations should be imposed upon the law of personal insult, because, as already observed, the one is an injury to *reputation*, and the other constitutes an offence against *mental comfort*. Mr. Starkie himself admits that 'it is obvious that the application of these principles in particular instances must, in a great measure, depend on the state and circumstances, manners and habits of the society for whose use such rules are to be applied.' And bearing this in mind, it seems to me that unadvanced countries like India present a state of society where personal insult needs more checks than in more civilized countries like England.

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"Another objection, so far as I can gather from the English text-books, to recognising personal insult as a distinct tort, is that it 'would afford far too large a scope for vexatious litigation, and the ordinary intercourse of society would be impeded and fettered by the apprehension of vexatious and harassing suit for trifling causes.' The answer to such an argument is, I think, furnished best by the celebrated dictum of Lord Holt in *Ashby* v. *White* (1): 'As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have this action, for it is a personal injury. And it is no objection to say that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense.' Indeed, the objection that vexatious litigation will be multiplied if personal insult is recognised as a civil wrong, seems to me to raise a general question applicable to all kinds of torts, *viz.*, the question whether slight injuries should not form an exception to the general principles of liabilty for civil wrongs. The Indian Penal Code (s. 95) lays down the general rule that 'nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.' Whether this rule should be adopted wholly or in a modified form in the law of civil wrongs is a question which I shall discuss later on; but I may observe here that in most cases the ordinary common sense of mankind may be taken as a sufficient guarantee against trifles being made the subject of litigation.

[I may add that if any further guarantee is required, it is furnished by the discretionary power conferred by the rules of procedure in England and America, and by s. 220 of our own Code of Civil Procedure in regard to the apportionment of costs.]

"The real question seems to be whether personal insult causing mental distress deserves a substantive place in the list of civil wrongs. In other words, should protection from personal insult be

(1) 1 Smith's L. C. 268.

recognised as a right in itself distinct from the right of protection from defamation? If no such right exists, personal insult cannot, of course, constitute civil injury, nor would any remedy be needed. Such, however, is practically the state of the English law of torts, which provides no remedy for unpublished insult, which does not recognise mental distress in itself as a civil wrong, and which even, where the insult is publicly offered, causing distress of mind, insists, except in certain well-defined cases, upon proof of special or actual damage before granting any remedy. Speaking of personal insults, I may quote the language of Bentham in support of my view:—

"'In order to understand all the evil which results from these offences, they must be considered without reference to any remedies: it must be supposed that there are none. According to this supposition, these offences might be repeated at will; an unlimited career would thus be opened to insolence; the person insulted to-day might be insulted to-morrow, and the day after, every day and every hour; and each new affront would facilitate the next, and render more probable a succession of outrages of the same class.....Thus the individual obliged by his relative weakness to submit at the pleasure of his persecutor to similar vexations, and deprived, as we have supposed, of legal protection, would be reduced to the most miserable condition. Nothing more is required for establishing on the one part an absolute despotism and on the other an entire slavery.'"

I still adhere to the views expressed by me in the above quotation, and I am of opinion that personal insult and abusive language by itself, whether such insult or abuse does or does not amount to actionable slander in England, is in this country a cause of action for maintaining a suit such as the present. In this view I am supported by the authority not only of the cases which have already been referred to in the above quotation, but also by more recent rulings. Among these perhaps the most important is the case of *Srikant Roy* v. *Satcori Shaha* (1), in a footnote to the report of which case many of the previous rulings have been referred to, and which case was followed by the Calcutta Court in *Ibu Hossein*

(1) 3 C. L. R. 181.

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v. *Haider* (1). The effect of this last case seems to me to be somewhat misrepresented in the head-note. I say this because I understand the effect of this last ruling to be that (to use the words of Field, J., who delivered the judgment of the Court in that case) "language which, having regard to the respectability and position of the person abused, is calculated to outrage his feelings, lower the estimation in which he is held by persons of his own class, and so bring him into disrepute, is actionable." In the case before the learned Judges it does not appear from the report that any special or actual damage was proved, and the judgment appears to have proceeded upon the ground that injury to personal feelings, that is, mental distress, caused by abusive language, is *per se* a cause of action for a suit of this character, and, as such, actionable without proof of any further damages, pecuniary or temporal, in any other sense.

I am of opinion that the view taken in the case last cited is the right view of the law as applicable to British India, that view being consistent with the ruling of Mitter, J., and Maclean, J., in the case of *Srikant Roy* v. *Satcori Shaha* (2) which it followed. In the case last mentioned the question seems to have been similar to the one with which we are concerned in this case, because here, as in the case last referred to, the obvious object in using the abusive language was due to discredit the plaintiff, who had been summoned as a witness. But among the Indian reported cases upon the subject none is more important than the ruling of the Madras High Court in *Parvathi* v. *Mannar* (3), where Turner, C. J., in delivering the judgment of the Court, held that the rule of English law which prohibits, except in certain cases, an action for damages for oral defamation unless special damage is alleged, being founded on no reasonable basis, should not be adopted by Courts of British India; and that learned Chief Justice, in considering the matter, went on to say, with the concurrence of Mr. Justice Muttusami Ayyar:—

"In this country we are not bound to adopt the rules regulating compensation for injuries which are recognised by the English Courts, though it has been the practice of Judges in British India to regard the decisions of the English Courts with the highest

(1) I. L. R. 12 Calc. 109. (2) 3 C. L. R. 181.
(3) I. L. R. 8 Mad. 175.

respect as embodying the wisdom and experience of a judiciary whose reputation is second to none for independence and ability. But the distinction drawn by the English law between written or printed and oral slander, which is said to have its origin in the circumstance that the most frequent instances of oral slander were at one time punishable by Ecclesiastical Courts (2 Salked, 694), has been condemned by many eminent English lawyers. Mr. Starkie observes that the distinction must be regarded as an absolute peremptory rule not founded on any obvious reason or principle. In *Roberts* v. *Roberts* (1) Cockburn, C. J., and Crompton and Blackburn, JJ., pronounced the law of England unsatisfactory and regretted they were bound by it. In *Lynch* v. *Knight* (2) the Lord Chancellor Campbell expressed the same views, and Lord Brougham, in the same case, declared that the English law was in this respect not only unsatisfactory but barbarous. The Indian Law Commission, of which Lord Macaulay was a member, in its report on the proposed Penal Code, demonstrated that the English law regarding defamation was inconsistent and unreasonable (Introductory Report, Note, p. 7, Macaulay's Works, p. 546). The civil law does not recognise the distinction, nor does the law of Scotland; and the recommendations of Lord Macaulay's Commission were approved and accepted by the British Indian Legislature. We therefore feel justified in giving effect to our conviction that the rule we are considering is not founded on natural justice and should not be imported into the law of British India."

There is thus ample authority in the Indian case-law to show that the English law of torts, as to verbal abuse and slander, is not the law of British India, and that we should be importing that law, regardless of the conditions of the people, if we were to apply wholesale the very peculiar rules of that law, on this point denounced by many eminent English lawyers themselves, and called by Lord Brougham as "not only unsatisfactory but barbarous."

There is one more point which was pressed upon us by Mr. *Kashi Prasad*, and that is, that if the statement of the defendant as to the plaintiff being "illegitimate and out of caste" (because such is the only interpretation which the idiom of Hindustani

(1) 33 L. J. Q. B. 248. (2) 9 H. L. Cas. 598.

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would warrant in respect of the words used by the defendant) be true, no cause of action arises for such an action. Now, in the first place, this contention, which amounts to raising a plea of justification, was not clearly raised in the defence, and in the next place, even if it had been clearly set up, I hold, for reasons to be presently stated, that such a plea could not by itself furnish a full defence to the action.

It is perfectly true that under the English law of defamation a plea of justification supported by proving the truth of the statement is a valid defence to a civil action, though even under that law such plea was not allowed in criminal proceedings until recent legislation provided that "the truth of the matter charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published" (Starkie, p. 718). Similar is the effect of the criminal law of India (s. 499 of the Penal Code, Except. 1), and my brother Straight in *Abdul Hakim* v. *Tej Chandar Mukarji* (1) went the length of saying that "although the provisions of the Penal Code with regard to defamation are applicable to criminal charges, the principles therein embodied are well adapted to supply the tests by which the liability or otherwise of defendants to civil suits should be decided."

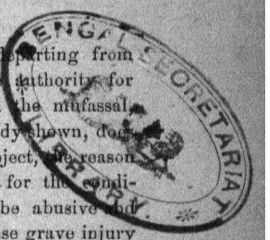
It is however, not necessary for me to rule how far I am prepared to adopt either the English law of defamation as to the plea of justification in civil cases or the *dictum* of my brother Straight which I have just quoted; though I confess I incline to the latter view, as I think the distinction drawn by the English law between civil and criminal liability (so far as the plea of justification is concerned) proceeds upon grounds (Starkie, pp. 529, 718) which can scarcely be reconciled with juristic reasoning.

I do not regard the case now before me as one of defamation, pure and simple, but one of *personal insult*, though it may be that that insult was conveyed by words of a defamatory character.

In the long quotation which I have already made in this judgment I have stated my reasons for holding that *defamation* must not be confounded with *personal insult*: the one being an

(1) I. L. R. 8 All. 815.

offence against reputation having falsehood or misrepresentation as its instrument, the other an offence independent of the element of misrepresentation, the primary object of the offender being not injury to reputation but the humiliation of his victim or injury to his peace of mind. Personal insult therefore is in itself a substantive wrong, and independent either of the falsehood of the statements contained in the abusive language employed, or of publication, though the publicity of the occasion may be an element for consideration in assessing damages.



I am aware that in laying down this rule I am departing from the English common law, but there is no legislative authority for holding that that law is applicable to such cases in the mufassal, whilst the case-law of British India, as I have already shown, does not adopt the rules of the English law on the subject, the reason being that such rules in their entirety are not fitted for the conditions of the Indian populations. Language may be abusive and insulting, though it states the truth, and it may cause grave injury to the most tender feelings of the human heart. No person who for example is illegitimate or an out-caste or has a bodily infirmity likes to be reminded of these facts in abusive terms, and if the gentlest touch or even attempt to touch under certain circumstances amounts to assault and battery and as such an actionable wrong, I fail to see why violent abuse should not be an actionable wrong, unless, indeed, it can be said that mental pain is not to be compared with bodily suffering in granting compensatory relief.

But whilst laying down this rule, I must guard myself against being understood to hold that malice is not a necessary element of the wrong, for I am of opinion, that when abusive and insulting language is employed, the law will infer and presume malice, unless the defendant proves his conduct to be *bonâ fide* or shows that the occasion was privileged. I wish also to point out that nothing that I have said is to be understood as contradicting the rule laid down by the Madras High Court in *Sri Raja Sitarama Krishna Rayadappa Ranga Baz Bahadur Garu* v. *Sri Raja Sanyasi Razu Pedda Baliyara Simhulu Bahadur Garu* (1), where it was held that the omission of a mere courtesy cannot be taken to be equivalent to

(1) 2 Mad. H. C. R. 4.

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slandering or libelling a man and is not an actionable wrong. The case was not dealt with as one of personal insult nor was the question of malice or the question of special or actual damage considered in the case. It may have been that the omission complained of was *bonâ fide* and having been made in a judicial proceeding was privileged. Again, the ruling of this Court in *Oodai* v. *Bhowanee Pershad* (1) and of the Madras High Court in *Subbaiyar* v. *Kristnaiyar* (2) are no authorities against my view, because in both those cases the turning point of the decision was that male members of a family cannot sue for the injury or insult which they have sustained indirectly in consequence of ill-treatment of certain female members of the family. Indeed, in the former of these cases it was left an open question whether the female members of the family who had been insulted could not maintain an action in their own behalf, whilst the latter case, leaving the same question open, proceeded entirely upon the technical ground of the absence of *locus standi* in the plaintiff. How far I am prepared to accept the ground upon which these two rulings proceeded is a question which I am not called upon to determine in this case, though both those rulings are consonant with the English law, so far as I can understand those cases from the facts stated in the published reports. There is, however, another case to which I wish to refer—*Pitumber Dass* v. *Dwarka Pershad* (3), in which it was held that making and publicly exhibiting an effigy of a person, calling it by the person's name, and beating it with shoes, are acts amounting to defamation of character for which a suit for recovery of damages will lie. The case was no doubt dealt with as falling under the rule of the English law of libel, though the learned Judges in regarding the case as one of defamation do not appear to have considered how far the effigy and its maltreatment were subject to the plea of justification. Under the English law of libel, if no such plea could be raised, the conduct of the defendants would no doubt be actionable; but according to the view which I have taken, I should probably have regarded the case as not one of defamation as understood in the English law of slander and libel, for which falsehood and misrepresentation are necessary elements, but simply as a case of

(1) N.-W. P. H. C. Rep., 1866, p. 264. (2) I. L. R. 1 Mad. 383.
(3) N.-W. P. H. C. Rep. 1870, p. 435.

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personal insult and, as such, actionable, *per se*, as a substative tort in itself, without proof of actual or special damage.

I now proceed to deal with the second question in this case, *viz.*, the plea of privilege. And in dealing with this part of the case, I think the analogies of the English law furnish a good guide, though of course that law deals with the matter as relating to defamation, and not to mere abusive or insulting language, for that law does not recognise personal insult as in itself an actionable wrong. The grounds of privilege as to statements made in the course of judicial proceedings are stated to be those of public policy in the interests of justice, and they are well set forth at p. 173 of Starkie's work, and the same author summarizes the English law so far as it relates to the privilege of witnesses (p. 179) in the following words :— "By the general policy of the law the witness is privileged ; and therefore no action will lie for a statement made by him in the course of a judicial proceeding, whether by affidavit or *viva voce*, even though it be alleged to have been made falsely and *maliciously*, and without any reasonable or probable cause, and that the plaintiff has suffered *damage* in consequence." The same seems to be the effect of the cases cited by Mr. Bigelow (*Leading Cases on Torts*) at p. 162 of his work. The question of the extent of the privilege of a witness in making statements was, however, well considered in a more recent case—*Seaman* v. *Netherclift* (1), in which there are valuable *dicta* of Cockburn, C. J., Bramwell, J. A., and Amphlett, J. A., who presided in the Court of appeal. The judgments of those eminent Judges show that whilst they were not fully agreed upon all minor points, they were unanimous in laying down the broad proposition of law that the privilege of a witness is limited to the time when he is actually under examination. Whether such privilege has application to statements having no reference to the matter which the Court is investigating was left an open question in that case. Cockburn, C. J., after laying down that "a witness is privileged to the extent of what he says in course of his examination," went on to say : "Neither is that privilege affected by the relevancy or irrelevancy of what he says ; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are

(1) L. R. 2 C. P. D., p. 53.

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not strictly relevant to the issue." But he added: "I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say *dehors* the matter in hand, is necessarily protected." Upon the same point Bramwell, J. A., in delivering his judgment, drew a distinction between relevant facts in evidence and matters "*having reference to the enquiry*," and he held that the latter phrase was preferable to and wider than mere questions of *relevancy*, as defining the limits of the privilege of a witness. And in dealing with the argument of counsel, the learned Judge went on to say (p. 60):—"Mr. Clarke said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. Suppose, while the witness is in the box, a man were to come in at the door, and the witness were to exclaim 'that man picked my pocket.' I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything witness said as a witness should be protected than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that I think the words '*having reference to the inquiry*' ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the Judge would give ground for a new trial, but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness."

Amphlett, J. A., in delivering his judgment in the same case, after saying that there were "many reasons why a witness should be absolutely protected for anything he said in the witness-box" went on to say: "Anything that tended to disparage the credit of a witness may be said to be *relevant* to the enquiry in which the

witness is giving his evidence ....."No doubt the strong language the defendant used, which was quite unnecessary, prejudiced him with the jury; but the unnecessary strength of the language cannot affect the question of privilege."

In the present case the plaintiff's deposition shows, and the lower appellate Court has interpreted it to mean, that "he was abused *after* the defendant's deposition was over," and that Court goes on to say: "If this is a fact, and probably it is so in the absence of any evidence to the contrary, then in my opinion he (defendant) had no right to use the ill expressions towards the plaintiff, a respectable person in his retired life.....The privilege of a witness lasts as long only as he has been deposing on oath in the witness-box, but not after it."

The passage in the plaintiff's deposition to which these remarks refer clearly shows that the abusive language was employed by the defendant against the plaintiff after the defendant had finished his deposition and was no longer in the witness-box. But this question, as pointed out by the lower appellate Court, has not been tried upon the merits, and I may observe, that the deposition given by the present defendant in the suit of *Sheobadan Singh* v. *Dawan Singh* would be, perhaps, the most important piece of evidence for determining whether the abusive language now complained of in this suit was uttered by the defendant in the course of his examination as a witness. The language is stated to have been uttered in answer to a question put by the Munsif who presided in the Court, requiring the defendant to give some explanation why the present plaintiff had deposed against the case set up by the present defendant, who was also defendant in the former action.

I agree with the lower appellate Court in holding that the case has not been tried upon the merits, and I shall uphold the order of that Court now under appeal directing a trial *de novo*.

But because the points of law which have arisen in this case are of considerable importance; because upon these points the Legislature has not yet settled the law; because the English common law of torts, in my opinion, is not in its integrity applicable to this country; because I have in this judgment departed from

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that law in some important points, I consider it necessary before concluding this judgment to formulate the exact propositions of law upon which this judgment proceeds. Those propositions are the following:—

Firstly, that the English law of slander as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage, is not applicable to this country either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India.

Secondly, that whilst the English law of defamation recognises no distinction between defamation as such and personal insult in civil liability, the law of British India recognises personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage.

Thirdly, that such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury apart from defamation.]

Fourthly, that malice is an element of liability for abusive and insulting language.

Fifthly, that such malice will be presumed or inferred unless the contrary is shown.

Sixthly, that where the defendant is not absolutely privileged and protected by reason of the office or the occasion on which he employed such language, he renders himself subject to a civil liability for damages, irrespective of any plea of justification based upon proving the truth of the statements contained in the abusive and insulting language complained of.

Seventhly, that the rule of English law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insulting and abusive language used by such witness.

Eighthly, that such statements when made in the witness-box are privileged and protected, even though made maliciously and

falsely, so long as they are relevant to the inquiry, or have reference to the inquiry in the broadest sense of the phrase.

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Ninthly, that even where such statements have no reference to the inquiry, the defendant may prove the absence of malice and that such statements were made in good faith for the public good.

As the case has not been tried upon the merits, it is impossible to determine at this stage which or how many of these propositions would be applicable to the facts, beyond the rule that abusive and insulting language is actionable *per se* without proof of special or actual damage, unless such language is excused or protected by some other rule of law.

The case was therefore rightly remanded by the lower appellate Court for trial upon the merits, and that trial must, in my opinion, proceed with reference to the legal propositions which I have already enunciated. My brother Brodhurst is, however, of opinion that the case as it stands already is ready for final adjudication, and that the question of privilege obviates the necessity of entering into the vaster question as to whether abusive and insulting language is actionable *per se*. I wish I had been able to take the same view of the record of the case as it now stands. But I find that in the first place the plea of privilege was neither pleaded by the defendant before the Munsif, nor was it made the subject of an issue so as to enable the parties to produce evidence upon that issue. The record of the case shows that the issues were framed on the 7th November, 1887, and the Munsif examined the parties on the same day, and without taking any further evidence dismissed the suit. Under these circumstances, I cannot help agreeing with the lower appellate Court in the view that, even in respect of such defence as the doctrine of privilege might furnish, there has been no proper trial upon the merits, and that the Munsif in this omission was influenced entirely by a misapprehension of the meaning of the plaintiff's deposition. According to the view which my learned brother is inclined to take of the doctrine of privilege in such cases, the question of good faith is a question of fact, which must be determined upon its own individual merits, with reference to the circumstances of each case, proved by evidence, for producing which the parties must have such opportunities as the law

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of procedure allows them. This was not done here, because, as the record shows, the examination of the parties was virtually an examination such as ss. 117, 118, and 119 of the Code contemplate, an examination the primary object of which is to enable the Court to frame proper issues. In this case neither the question of privilege at large nor the question of *bona fides* was made the subject of an issue, and I should have been willing to consent to any order made by my learned brother such as would admit the trial of those points of fact before final adjudication.

But the facts which might sustain a plea of privilege have not been ascertained by judicial trial in this case, nor has the question of *bona fides* been made the subject of inquiry. I have indeed, in deference to my learned brother's views, consented to an order sending for the record of the former suit, that is, the one in the course of which the defendant used the abusive language complained of in this action. But the record of that case affords no help, even if we as a Court of second appeal could deal with that record as evidence in this case. That record, if it shows anything, shows that the abusive language was not incorporated in the defendant's deposition, and in the absence of a total want of the trial of the point as to privilege, it cannot be the result of a judicial inquiry, but a mere surmise to hold that the abusive language complained of was employed whilst the defendant was under examination as a witness, or that it was so employed *bonâ fide*.

It is perfectly true, as admitted in this case, that the abusive language was employed in an answer to a question put by the Munsif. But it is equally true that the question was not needed, and it would be extending the doctrine of privilege far beyond its bounds, even as known to the English law, to hold that the mere incident of such a question being put by the Court is to afford the person to whom such question is put an unbounded privilege of abusing another in open Court, without a proper ascertainment by trial of the facts which might furnish a legal basis for such privilege, a trial which we as a Court of second appeal can scarcely hold ourselves.

So far as the question of *bona fides* is concerned, I hold the same opinion as my brother Straight expressed in *Abdul*

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Hakim v. *Tej Chander Mukerji* (1), and re-affirmed by him in *Queen-Empress* v. *Dhum Singh* (2). And I may add that so far as the *quantum* of damages claimed is concerned, nothing that I have said in this judgment must be taken to lay down any rule as to assessment. The considerations which regulate the assessment of damages in such cases necessarily rest upon the determination of the facts and circumstances of each case, and I do not think that the case is in its present state ready for any adjudication as to the amount of damages. The question will, however, no doubt be determined by the Court of first instance, to which, by the order of the lower appellate Court, the case has been remanded for re-trial.

I would dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1888
June 23.

Before Mr. Justice Straight.

QUEEN-EMPRESS v. DURGA.

Act V of 1861, *ss.* 8, 29—*Police Officer—Suspension—Breach of order.*

A police constable was suspended and ordered to remain in the lines during suspension. Despite the order he absented himself therefrom without leave. He was convicted under s. 29 of Act V of 1861.

Held, s. 29 of Act V of 1861, contemplates that the person to be charged with an offence under it must have been, at the time of his doing the act in respect of which the charge is preferred, a police constable within the meaning of that Act. When a police officer is suspended, he ceases to be a police officer; the conviction was therefore wrong.

The Queen v. *Dinonath Gangooly* (3) followed.

The facts of this case are stated in the judgment of the Court.

The *Public Prosecutor* (*Mr. G. E. Rose*), for the Crown.

STRAIGHT, J.—This case has been reported by the learned Judge of Bánda for consideration as to whether the conviction of the accused under s. 29 of Act V of 1861, which contains the statute law on the subject, can be sustained. S. 29 of the Act to which I have referred provides:—"Every police officer who shall be guilty of any violation of duty, or wilful breach or neglect of any rule or regulation or lawful

(1) I. L. R. 3 All. 815. (2) I. L. R. 6 All. 220.
(3) 8 B. L. R. App. 58.

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order made by competent authority; or who shall withdraw from the duties of his office without permission, or without having given previous notice for the period of two months; or who shall engage, without authority, in any employment other than his police duty; or who shall be guilty of cowardice; or who shall offer any unwarrantable personal violence to any person in his custody, shall be liable, on conviction before a Magistrate, to a penalty not exceeding three months' pay, or to imprisonment, with or without hard labour, for a period not exceeding three months, or to both."

In this particular case it appears that the man Durga was a police constable employed in the police force of these Provinces; that for some misconduct upon his part he had been ordered by his District Superintendent to be suspended and to remain in the lines during such suspension; that despite the order that he was to remain in the lines, he absented himself therefrom without leave; and it was in respect of his doing so that he has been charged under s. 29, Act V of 1861, and convicted by the Magistrate. When this reference came before me, I thought the matter of sufficient importance to invite the learned *Public Prosecutor* to be good enough to give me the benefit of his valuable assistance, more particularly as there was to be found in the Bengal Law Reports, Vol. VIII, Appendix, page 58 (*The Queen* v. *Dinanath Gangooly*), a decision which, if a right decision, governs this case and settles the question as to whether such a conviction as that which had been had against Durga can be sustained. I have heard the learned *Public Prosecutor*, and I have had an opportunity also of carefully considering the terms of the judgment of the two learned Judges of the Calcutta High Court, and I am constrained to come to the conclusion that they were right. The provision contained in s. 29 of Act V of 1861 contemplates that the person to be charged with an offence under that section must have been, at the time of his having done the act in respect of which the charge is preferred, a police constable within the meaning of that statute; and by s. 8, read in conjunction with the form to be found in the schedule attached to the Act, it is clear, that when once a police officer has been suspended, it is his duty to hand over to his superior officer the certificate under which he is appointed a member of the police

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force ; so that the effect of the statute, as pointed out by the two learned Judges of the Calcutta Court, is that a police officer who has been suspended, from the mere circumstance of that suspension, ceases to be a police officer, because it is ordered by the Act that when he is suspended his certificate, hitherto in operation, shall cease to have effect, and shall be immediately surrendered to his superior officer. I cannot help concurring with that view, though, with the profoundest respect for the framers of the law, the policy or convenience of such a provision seems to me doubtful. Indeed, with reference to what transpired yesterday in the course of the case of *Muhammad Mian Khan* (1), and from what appears in the present case, it is difficult to see how the discipline of the police force can be properly preserved unless the District Superintendents have larger and more clearly defined statutory powers to deal with insubordination. It is no use framing rules and formulating police manuals, if such rules and the directions in such manuals are not authorized by or are in hostility with the statute, and I think the subject is one which may fairly claim attention at the hands of the Local Government, specially just now, when there are so many complaints of the working of the present police system, and a thorough overhauling and re-organization seems desirable.

I quash the conviction and sentence of Durga, because on the terms of the statute it seems to me I have no option, and he will stand acquitted. I direct that a copy of this order be forwarded to the Local Government and to the Inspector-General of Police. Under these circumstances the reference must be accepted, the conviction and sentence being set aside, the accused will stand acquitted.

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(1) Unreported.

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March 20.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

KACHWAIN (DEFENDANT) *v.* SARUP CHAND AND OTHERS (PLAINTIFFS)*.

Execution of decree—Property liable to attachment and sale—Grant to Hindu widow for maintenance for life—Reversionary right of grantor—Act VIII of 1859, s. 205—Civil Procedure Code (Act XIV of 1882), s. 266 (k)—"expectancy."

One *N*, the sole owner of a certain village, had a son *J*. *J*. had two wives. By his first wife he had a son *U*. *J*.'s second wife was *G*. by whom he had a son whose widow is *K*., the defendant in the suit. *J*. died, leaving *U*. his son, *G*. his widow, and K. his son's widow, and on his death *U*. inherited the village. Prior to the year 1874 *U*. had made a gift to *G*. of 105 bighas situate in the village. In 1874 the rights and interests of *U*. in the village were sold by auction and purchased by *T*., the ancestor of the plaintiffs. *G*. by a deed of gift conveyed the 105 bighas to *K*. and ultimately died on 20th January, 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned Judge found that the land was given to *G*. in lieu of her maintenance which she was to hold rent free for her life and that she had been in possession thereof for twenty years. Further that *U*. had the right to resume the land and assess it to rent on the death of *G*. and that all the rights and interests of *U*. in the land were attached and sold in 1874. On second appeal it was contended that the interest of *U*. in the land at the time of the sale of the village by auction was in the nature of a mere expectancy and therefore could not be sold and was not sold. *Held*, that *U*. gave to *G*. the usufruct of the land for her life in lieu of her maintenance. That after the gift the interest of *U*. in the land was of the same character and carried with it the same consequences, as the reversion which the lessor would have for land leased for life or years and analogous to the right which a mortgagor who had granted a usufructuary mortgage would have. That *U*. had a vested right in the land which was capable of being sold, and that right passed to the auction purchaser at the sale of 1874.

Counsel for appellant cited the following cases in the course of his argument: *Koraj Koonwar* v. *Komui Koonwar* (1), *Ram Chunder Tanta Doss* v. *Dhurmo Narain Chukarbatty* (2), *Tuffuzzool Husain Khan* v. *Raghunath Pershad* (3).

One Niraud Singh was the sole owner of a certain village. On his death the village was inherited by his son Jawahir Singh. Jawahir Singh had two wives. By his first wife he had a son called Umrao Singh. By his second wife, Musammat Galotan, he had a son who married Musammat Kachwain. Jawahir Singh died, leaving Umrao Singh, Galotan, and Kachwain surviving him.

* Second appeal No. 582 of 1886, from a decree of A. Macmillan, Esq., Judge of Mainpuri, dated 6th January, 1886, confirming a decree of the Subordinate Judge of Mainpuri, dated 17th September, 1883.

(1) 6, W. R. C. R. 34. (2) 15, W. R. F. B. R. 17.
(3) 14, Moo, I. A. 41.

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On his death Umrao Singh inherited the village. On the 20th August, 1874, the rights and interests of Umrao Singh in the village were put up for sale in execution of a decree, and were purchased by one Tara Chand.

Galotan had on the 26th July, 1882, transferred certain land in the village to Kachwain, by a deed of gift, and died on the 26th January, 1883.

The plaintiffs in this case, who were the representatives of Tara Chand, sued Kachwain, to set aside the gift and for possession of the land. The contention for the plaintiffs was that Tara Chand had purchased the village including the land in suit; that the land had been given to Galotan for her life only; that she had no power of alienation; and that as she was dead, the defendant Kachwain was no longer entitled to possession of it. The contention for the defendant was that the sale to Tara Chand did not pass the land to him; that the land had not been given to Galotan for life only; that Nirand Singh had given the land to Galotan rent free as "*pan masala*," and after his death Jawahir Singh had allowed the land to remain in Galotan's possession as *stridhan*, and she had become the absolute owner of it, and that holding it at the time of the gift as absolute owner she had power to make the gift. The Court of first instance gave the plaintiffs a decree for the possession of the land, which on appeal the lower appellate Court affirmed.

On second appeal by the defendant, Edge, C. J., and Mahmood, J., remanded to the lower appellate Court the following issues for trial:—

1. Who made the gift of the land in suit to Musammat Galotan for maintenance during her life?

2. What were the terms of the grant?

3. How long was she in possession?

4. What interest, if any, had Umrao in the land in suit at the date of the sale, *i.e.*, on the 20th August, 1874.

5. Was such interest actually attached, proclaimed, and sold at that sale?

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6. What were the terms of the order of attachment, of the proclamation, and of the order confirming the sale?

On the 1st issue the lower appellate Court found that Umrao Singh had granted the land to Galotan for maintenance during her life. On the 2nd issue it found the terms of the grant to be that Galotan should hold the land rent-free for her life-time in lieu of maintenance. On the 3rd issue it found that Galotan was in possession under the grant for twenty years. On the 4th issue the finding was, that the interest which Umrao Singh had in the land on the 20th August, 1874, before the sale took place, was a right to resume the land and assess it to rent on the death of Galotan. On the 5th issue the Court found that the interest which Umrao Singh had in the land on the 20th August, 1874, before the sale took place was not specifically attached and sold at that sale, but as the whole rights and interests of Umrao Singh in the village were attached and sold, such interest must be considered to have passed to the purchaser. On the 6th issue it found that the proclamation of sale had been destroyed and its terms could not be ascertained, but that the orders of attachment and confirmation of sale showed that the whole rights and interests of Umrao Singh in the village had been attached and sold.

On the return of these findings objections were taken by the defendant-appellant.

Mr. W. *Colvin* and Hon. Pandit *Ajudhia Nath*, for the appellant.

Pandit *Sundar Lal* and Babu *Sital Prasad Chatterjee* for the respondents.

EDGE, C. J.—This is an action brought by the representatives of a purchaser at an auction-sale of the interest of one Umrao Singh in a village sold in execution of a decree on the 20th August, 1874. One Rao Nirand Singh had a son named Jawahir Singh. Jawahir Singh had two wives. By his first wife he had a son Umrao Singh, who is still alive, and whose property was sold. Jawahir Singh's second wife was Musammat Galotan. By her he had a son, whose widow, Musammat Kachwain, is the defendant in this action and appellant in this appeal. Rao Nirand Singh and Jawahir Singh died previous to the 20th August, 1874. Musammat Galotan, on the 26th July, 1882, executed a deed of gift in

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favour of the defendant-appellant, and on the 26th January, 1883, Musammat Galotan died. The deed of gift related to 105 bighas of land which were situate in the village in question and form the subject of the claim in this action. The plaintiffs contended that Umrao Singh had given those bighas in dispute to Musammat Galotan for her life for maintenance. The finding on remand is in accordance with that contention. The defendant, on the other hand, contends that the bighas in dispute had been given by Rao Nirand Singh to Musammat Galotan, and that the gift had been confirmed by Umrao Singh's father, Jawahir Singh. That contention has been disposed of by the findings on remand. Many questions were raised by the appellant before us. It was contended that at the date of the sale in 1874, Umrao Singh had no interest remaining in the bighas in question that could be sold under s. 205 of Act VIII of 1859, and it was contended that after the gift made by Umrao Singh to Musammat Galotan, Umrao Singh stood in no better position than that of a first expectant reversioner to property in possession of a childless Hindu widow. It appears to me that the position of Umrao Singh was very different to that of such a reversioner. What had been done in effect was this. Musammat Galotan, being entitled to maintenance, Umrao Singh, who was the full owner of the whole village, gave her for her life the usufruct of these 105 bighas in lieu of her maintenance, limiting the grant to her for her life, and she accepted the bighas on those terms. Umrao Singh's interest, as it appears to me, was much more than the mere expectancy of a reversioner to property on the death of a Hindu widow. It was of the same character, and carried with it the same consequences, in my opinion, as the reversion which the lessor would have for land leased for life or years, and would be analogous to the right which a mortgagor who had granted a usufructuary mortgage would have. It is misleading to use in connection with such a right the term "expectancy." On the determination of the life-interest, the right to possession would be in Umrao Singh or his assignee, or if he had not assigned and had died, then in his heirs. I think that the cases cited by Mr. *Colvin* (*Koraj Koonwar* v. *Komul Koonwar* (1), *Ram Chunder Tantra Doss* v. *Dhurmo Narain Chukerbutty* (2 do not apply. The case which

(1) 6, W. R., Civ. R., 34. (2) 15, W. R., F. B., 17.

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was cited to us, namely, *Tuffuzzool Hossein Khan* v. *Raghoonath Pershad* (1), obviously does not apply. That was a case in which the thing which was sold at auction was the chance of the success of a party in an arbitration. It was said on behalf of the appellant further that the bighas in question, having been granted by Umrao Singh to Musammat Galotan in lieu of maintenance, they became her *stridhan*, and that Umrao Singh ceased to have in them a saleable interest. That proposition would be a correct view of the law if Galotan's interest had not been limited to an interest for her life. This was not an absolute gift by Umrao Singh, but merely a grant to operate during the lifetime of Musammat Galotan. There was a considerable amount of legal argument as to the rights of a Hindu widow in the property left by her husband in respect of her right of maintenance. I do not think that any of those arguments assist us in the determination of this case, which is not one of partition, but is one of a private arrangement between Umrao Singh and Musammat Galotan, by which he agreed to give to her and she agreed to receive from him, these bighas for her life only and as a mode of payment of her maintenance. In my opinion, whatever might have been the position of Musammat Galotan if this had not been the arrangement that had been come to, we must give effect to that arrangement or agreement, and consider the effect of that agreement only. In the result I have come to the conclusion that Umrao Singh had a vested right to these bighas in question which was capable of being sold at the auction-sale, and that that right, that is, the right of possession on the death of Musammat Galotan passed to the auction-purchaser at the sale on the 20th August, 1874. The appellant before us may or may not be entitled to maintenance out of these lands in question. That point has not been raised in the action and no issue has been framed relating to it, and consequently I do not think I would be justified in giving any opinion on the subject. In my opinion this appeal should be dismissed with costs.

MAHMOOD, J.—I am of the same opinion.

Appeal dismissed.

(1) 14, Moo., I. A., 41.

REVISIONAL CIVIL.

1888
April 6.

Before Mr. Justice Mahmood.

MUHAMMAD HUSAIN (PETITIONER) *v.* AJUDHIA PRASAD AND OTHERS (OPPOSITE-PARTY)*.

Civil Procedure Code (Act XIV of 1882) s. 401, Explanation,—s. 622—High Court's powers of revision—Practice—Suit in formâ pauperis—"Pauper"—Inquiry into pauperism.

On an application to sue *in formâ pauperis* the Court is required to deal with the question of the applicant's pauperism with reference to the definition of that word as given in the Explanation to s. 401 of the Code of Civil Procedure, and in deciding it to ascertain the exact property, its market value and the title thereto and then to deal with the case under s. 407 of the Code, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure.

All orders passed under s. 407 of the Code of Civil Procedure are not excluded from the exercise of revisional powers of the High Court under s. 622 of the Code, *Chatterpal Singh* v. *Raja Ram* (1) notwithstanding.

In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order.

The facts of this case are stated in the judgment of the Court.

The applicant appeared in person.

Pandit *Bishambar Nath* for the opposite party.

MAHMOOD, J.—This is an application made under s. 622 of the Civil Procedure Code, invoking the revisional powers of this Court in the interests of justice within the meaning of that section.

The application relates to an order passed by the lower Court under s. 407 of the Civil Procedure Code disallowing the petitioner's prayer to be allowed to sue *in formâ pauperis* under the special provisions of Chapter XXVI of the Code.

The facts out of which the application has arisen may be briefly stated to be the following:—

The petitioner, Muhammad Husain, by a deed executed by him on the 6th August, 1881, usufructuarily mortgaged certain villages belonging to him to Shah Kirpa Dayal and others who are the

* Miscellaneous Application No. 235 of 1887.

(1) I. L. R., 7 All., 661.

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opposite party to the application. Under the terms of the mortgage a certain date, that is three years, was mentioned to be the period when the mortgage was either to be extinguished or to be liquidated. Similarly, on the 23rd December, 1881, the aforesaid Muhammad Husain executed another usufructuary mortgage-deed in respect of certain other property under terms and conditions similar to those of the previous mortgage, the rate of interest again being 12 per cent. per annum.

It is admitted before me by the petitioner Muhammad Husain in person and by Pandit *Bishambar Nath* on behalf of the opposite party that, whilst under the terms of the two mortgages themselves the opposite party would be entitled to obtain possession as usufructuary mortgagees of the property, by certain transactions subsequent to the mortgages, namely, on the 23rd September, 1881, and on the 6th June, 1882, the mortgagees accepted from the present petitioner Muhammad Husain *kabuliats* either leaving him in possession or replacing him in possession in lieu of payments of certain sums of money which were to be paid by the mortgagor to the mortgagees as money due under the *kabuliats*, the money being probably equivalent to such usufruct as the mortgagees would be entitled to take from the property in lieu of interest at 12 per cent. per annum.

Upon the statement of the main allegations between the parties, into the merits of which allegations I am not required to enter, the present petitioner came into Court alleging (to put the matter in the broadest terms) that the defendants, as mortgagees and also as the executants of the *kabuliats* abovementioned, had infringed the terms of those contracts; that they had wrongfully ousted the plaintiff from the possession of the mortgaged property and had committed acts of waste; and upon these allegations the petitioner alleged that he was entitled not only to possession of the mortgaged property, but also to a considerable sum of money which he claimed as compensation or damages which had accrued to him by the wrongful acts of the defendants.

The suit began, as it should have done, under s. 401 of the Civil Procedure Code, that is, by an application such as s. 403 of the Code requires. The application appears to have been registered,

not as a suit, but, as an application to be allowed to sue *in formâ pauperis*.

The application was resisted by the defendants mainly upon the grounds that the petitioner's allegation as to pauperism was not true, and that he could sue in the proper form.

The issue having been so raised the learned Judge of the lower Court appears to have allowed the parties to produce evidence of witnesses upon the issue. Having examined the witnesses he has recorded a judgment, the main portion of which may be quoted to be in the following terms:—

"On a consideration of the statements of the witnesses for the parties, this Court is of opinion that the applicant is not a pauper, inasmuch as it appears from the mode in which the claim has been made and the objections taken thereto by the opposite party, the allegation with which the claim has been made, and the form in which it has been brought, are not such as to render the suit fit for being heard or decided *in formâ pauperis*."

The learned Judge, after making these observations, goes on to surmise that the claim of the plaintiff may be taken to be extravagant and, as such, unfit for being dealt with *in formâ pauperis*.

The first question which I have to deal with here has arisen out of the preliminary objection taken by Pandit *Bishambar Nath* on behalf of the opposite party, namely, that upon the findings of the lower Court, it is not open to this Court, as a Court of revision, to interfere under s. 622 of the Code, and in support of this contention the learned pleader has relied upon the Full Bench ruling of this Court in *Chatterpal Singh* v. *Raja Ram* (1), and also upon various other rulings of this Court which, according to the learned pleader's contention, restrict and limit the revisional powers of this Court. So far as the ruling in the Full Bench case is concerned, all I need say is, that the facts of the case were vastly different from those to which this application relates; that the learned judges who signed the judgment of the majority of this Court, did not lay down any *general* principle of law applicable to the matter; and that, so far as I am concerned, I, in delivering my judgment, guarded myself against being understood

(1) I. L. R., 7 All., 601.

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to exclude all orders under s. 407 from the exercise of the revisional powers of this Court. A similar question has been quite recently considered by me in the case of *Ali Hamza* v. *Ahsan Ali* (1) Pandit *Bishambar Nath* further relies upon the other rulings of this Court under s. 622. I think nearly all these rulings were considered and cited by me in the case of *Dhum Singh* v. *Basant Singh* (2), where I gave expression fully to my views as to what I understood to be the effect of the Privy Council ruling in *Amir Hassan Khan* v. *Sheo Baksh Singh* (3) and the Full Bench ruling in *Badami Kuar* v. *Dina Rai* (4) and the other cases. Adhering as I do to the views I then expressed, I cannot but hold, consistently with those views, that in this case there has been a wrong exercise of jurisdiction by the lower Court, and that the application can be entertained in revision.

Now, in the present case, I am far from being satisfied that the learned Judge of the lower Court had consulted the exact definition of the word pauper as contained in the *Explanation* to s. 401 of the Civil Procedure Code, nor am I satisfied that, in dealing with the weight of evidence in the case, he was clear as to the exact person upon whom the *onus probandi* as to pauperism lay in a case such as this, or as to the requisites of legal proof before an alleged pauperism, supported as it must necessarily be by a duly verified statement, can be held not to have been made out. Further, I am not satisfied that the learned Judge did not mix up considerations as to the likelihood or the chance of the plaintiff's success in the suit as an element in guiding his decision as to whether or not the petitioner was a pauper.

The plaintiff's statement that he had no property other than that which he had mentioned in the application could, no doubt, be contradicted by other evidence; but before that evidence could be trusted as sufficient to disallow the petitioner the privilege of suing *in formâ pauperis* it was necessary to find clearly whether such additional property as might be proved to belong to the plaintiff was sufficient to pay the fee prescribed by law within the meaning of the *Explanation* to s. 401. The manner in which the learned

(1) Weekly Notes for 1888, p. 150.
(2) I. L. R., 8, All., 519.
(3) I. L. R., 11, Calc., 6.
(4) I. L. R., 8, All., 111.

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Subordinate Judge has dealt with the case shows that he did not consider it necessary to ascertain either the exact amount of court-fees which would be due upon plaintiff's plaint or the exact nature or value of the property which was alleged to belong to the petitioner over and above the subject-matter of the suit. Indeed no attempt in that direction appears to have been made, because the judgment of the learned Subordinate Judge does not even specify the property which he held the petitioner to be possessed of, much less is there the smallest trace of any issue as to the value of the property. General and vague statements as to the petitioner who comes into Court to sue *in formâ pauperis* cannot be regarded by me as adequate to divest him of a remedy which on proof of pauperism the law would award him, and I cannot hold that there is any finding in the judgment to show that the plaintiff is possessed of means which would enable him to maintain the action in the usual form.

The learned Pandit, whilst conceding that there is *no* documentary evidence to prove the title of the petitioner as to the property alleged to belong to him, has asked me to go into the merits myself and to adjudicate upon the exact effect of the oral evidence of witnesses produced by his clients, and to determine, upon the record as it now stands, questions as to the title and value of the various properties the ownership whereof was attributed by the witnesses to the petitioner. I have no hesitation in laying down the rule that if, as I have frequently said before, in second appeals it is not the duty of this Court to enter into the merits of the evidence, *a fortiori*, it is not the duty of this Court to enter into the merits of the evidence in cases of revision. I may add that any other view would impose upon Courts of revision duties not dissimilar to those of the Courts of first appeal. All that this Court as a Court of revision is required to do is to see whether the requirements of the law have been duly and properly obeyed by the Courts whose orders are subjected to revision, and whether the irregularity as to failure or exercise of jurisdiction is such as would justify interference by this Court.

I am of opinion that this is one of those cases in which those revisional powers should be exercised, and without prejudice to

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either party to the litigation the order which I think is necessary to make in the case is, to set aside the order of the learned Judge of the lower Court, to require him to deal with the question of pauperism with reference to the definition contained in the *Explanation* to s. 401 and, in deciding the question, to ascertain the exact property, its market value, and the title thereto, and then to deal with the case under s. 407, irrespective of any surmises as to the reason why the plaintiff has valued his claim at such a high figure. In dealing with the case under that section the learned Subordinate Judge will, of course, be at liberty to decide whether, even if the petitioner's pauperism is established, his case falls under any of the other clauses of the enactment.

I have considered it necessary to go into the matter so fully because, whilst I hold that pauper suits when frivolously brought should not be encouraged, I also hold that enough has already been done by the Legislature in the Code of Civil Procedure, not only in s. 407 but also in later sections, to provide checks upon such litigation. But it is equally clear that if these checks are too severely administered, in the sense of the various requirements of the law not being duly carried out before a pauper is kept out of Court, the effect will be far from what the Legislature aims at. Courts of Justice should be open alike to the rich and the poor. This is a revision case, and all that I am required to do is to allow the petition, and setting aside the order of the learned Judge of the lower Court to require him to dispose of the case again with reference to the observations which I have made.

Costs will abide the result.

Cause remanded.

APPELLATE CIVIL.

1888
April 6.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

SAKINA BIBI (PLAINTIFF) *v.* AMIRAN AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Pre-emptor out of possession of his own share—His own share lost by him pending appeal—Muhammadan Law.

The plaintiff instituted this suit to enforce her right of pre-emption in respect of a share in a village of which she alleged to be a co-sharer with the vendors. The

* Second appeal No. 51 of 1887 from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 22nd December, 1886, modifying a decree of Lala Manmohan Lal, Subordinate Judge of Azamgarh, dated the 12th June, 1886.

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defendants to the suit were the vendors, the vendees, and others who were rival claimants for pre-emption in the share sold. The rival pre-emptors alone defended the action on the ground, among others, that plaintiff was not in possession of her own share in the village out of which she alleged that her right to claim pre-emption arose. The Court of first instance dismissed her suit. In appeal the District Judge in effect dismissed her claim as against the defendants who were the rival pre-emptors, but gave the plaintiff a right to obtain the share if the other pre-emptors did not avail themselves of the decree which they had obtained in their action. On the 12th of January, 1887, plaintiff's second appeal was admitted, and on the 20th January plaintiff's share in the village out of which her claim to pre-emption in respect of the share sold arose, was sold in execution of a decree in another suit. Respondent contended that, as since the appeal the share out of which plaintiff alleged that her right arose was sold, she could not get any decree now in her favor.

Held, that this Court as a Court of Appeal have only got to see what was the decree which the Court of first instance should have passed, and if the Court of first instance had wrongly dismissed the claim, the plaintiff cannot be prejudiced by her share having been subsequently sold in execution in another suit; such a sale could not have affected her right to maintain the decree, if she had obtained a decree in her favor in the Court of first instance, either on review or on appeal, nor could it have been made the ground of appeal. Further, plaintiff being out of possession of her share at the time she instituted the suit for pre-emption was immaterial, the Court should have ascertained whether the plaintiff was at the date of suit entitled in law to the share out of which her right of pre-emption was alleged to have arisen.

Held, by Mahmood, J., that the passage from Hamilton's Heydaya by Grady, p. 502, means that in the pre-emptive tenement the pre-emptor should have a vested ownership and not a mere expectancy of inheritance or a reversionary or any kind of contingent right, or any interest falling short of full ownership.

Azima Bibi, Wasiha Bibi, and Yusaf Ali, three Muhammadan co-sharers, sold their three-pie share in village Khataula Khurd to Rahim Ali and Assid Ali for the sum of Rupees three hundred. As regards Muhammadan co-sharers, the Wajib-ul-arz of the village provided that sales of shares of co-sharers should be governed by the Muhammadan law of pre-emption. On the sale taking place, Amiran and Karim Bakhsh instituted a suit for pre-emption in respect of the share, and obtained a decree. Plaintiff (Sakina Bibi) instituted this suit on 1st April, 1886, against the above-named vendors, vendees and the pre-emptors to enforce her right of pre-emption, on the ground that she and the vendors are co-sharers and partners in the property sold which was their paternal estate, while the vendees were stangers, and the pre-emptors were sharers in a thoke of the village other than that in which the property sold was situated. On the same day that she filed this suit

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she also instituted a suit for possession of her share in the estate left by her father.

The vendors-defendants did not defend the action; the vendees contended that the sale to them was made with the knowledge of the plaintiff, who did not offer to buy; and the pre-emptors (defendants) urged that, inasmuch as plaintiff was not in possession of her share in the paternal estate in respect of which she claimed the right of pre-emption, she could not maintain the suit.

The Subordinate Judge finding that the plaintiff was not in possession of her share in the estate left by her father dismissed the suit. On the 9th July, 1886, plaintiff appealed to the District Judge, and that officer, agreeing with the Subordinate Judge, dismissed the appeal as against the rival pre-emptors, but directed that if they did not avail themselves of the decree they had obtained, then plaintiff should obtain the property on payment of the purchase-money.

On the 12th January, 1887, plaintiff preferred this second appeal, contending that whether she was or was not in possession of her share in the paternal estate, she was still a co-sharer in the village and entitled to maintain the suit.

On the 20th of January, 1887, the plaintiff's share in the village out of which she alleged that her right arose was sold in execution of a decree against her in some other case.

The appeal came on to be heard before Mahmood, J., who referred it to a Bench of two Judges with reference to the contention on behalf of the respondents that the plaintiff's own share in the village and out of which alone her claim to pre-emption in respect of the share sold had arisen, having been sold by auction and so lost to her, she was no more entitled to a decree in the suit. In support of their contention the respondents cited the case of *Khuda Bakhsh* v. *Ramlautan Lal* (1).

The appeal was then heard before EDGE, C. J., and MAHMOOD, J.

Mr. G. T. *Spankie*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

(1) Weekly Notes, 1884, p. 169.

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EDGE, C. J.—This was an action for pre-emption. The defendants Amiran and Karim Bakhsh were also claimants for pre-emption in the share sold. The Subordinate Judge dismissed the claim. The District Judge in effect dismissed the action as against Amiran and Karim Bakhsh, but gave the plaintiff a right to obtain the share if Amiran and Karim Bakhsh did not avail themselves of the decree which they had obtained in the action. From that decree this appeal has been brought.

Mr. *Abdul Majid* for the respondents has raised a preliminary objection. The objection is this :—He says, and it is not denied on behalf of the appellant, that pending the appeal to this Court, that is to say, since the appeal to this Court was filed, the share out of which the plaintiff alleged that her right arose was sold in the execution of a decree in some other case. He contends that under these circumstances we cannot pass a decree in her favour. He bases his contention on a passage cited to us from Shama Churun Sircar's Muhammadan Law (1) in which it is stated that "if the *shuffi* previous to the decree of the *kazi* sell the house from which he derives his right of *shuffa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated, notwithstanding he be ignorant of the sale of the house to which it related."

I do not accede to Mr. *Abdul Majid's* contention. It appears to me that sitting here as a Court of Appeal, we have got to see what was the decree which the Court of first instance should have passed, and if the Court of first instance wrongly dismissed the claim, the plaintiff cannot be prejudiced by her share having been subsequently sold in execution of a decree in another suit. It could not be contended, I think, if the plaintiff had obtained a decree in the Court of first instance, that her right to maintain the decree either on review or appeal could possibly be affected by a subsequent sale of the share out of which her right of pre-emption arose. The subsequent sale could not have been alleged as a ground of appeal for instance. It was not a matter which could have made the decree of the Court of first instance, in such a case, wrong in law or in fact; and I can see no distinction between the case in which the plaintiff obtains a decree for pre-emption in the Court of first

(1) Tagore Law Lectures, 1873, p. 335.

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instance, and a case in which she proves to a Court of appeal that she was entitled to a decree in the Court of first instance which she did not obtain. In consequence of this view the preliminary objection fails.

Now, as to the actual appeal before us, it appears that the plaintiff, at the date of the institution of the suit, was not in physical possession of the share out of which the right of pre-emption arose, and that she continued dispossessed up to the time of the judgment in the lower appellate Court. The lower appellate Court appears to have considered her case as one in which she had not proved her right against the other pre-emptive claimants on the ground that she was not in possession of the share out of which her right was alleged to have arisen. Now as to these circumstances, I think it was the duty of the lower appellate Court to ascertain whether the plaintiff was, at the date of the suit, entitled in law to the share out of which her right of pre-emption was alleged to have arisen. The mere fact of her not being in possession of it was immaterial except in so far as that fact might be urged as showing that she was not entitled to it. Now this is the question which the lower appellate Court has not tried. There is another material question in the case which has not been tried, and it is as to whether, assuming that the plaintiff is entitled to the share out of which the right is alleged to have arisen, she has only an equal right of pre-emption with Amiran and Karim Bakhsh or whether she has an inferior or superior right. The nature of the decree, if the plaintiff is entitled to one, will depend upon the findings on those points. I merely refer to these issues not as expressing exhaustively the issues that have not been tried, because the lower appellate Court has not tried any issues at all.

The decree of the lower appellate Court is set aside, the appeal decreed, and the case remanded under s. 562 of the Civil Procedure Code.

Costs to abide the event.

MAHMOOD, J.—I am of the same opinion, but as the Judge who referred the case to a Bench, I wish to say that the reasons and the facts which rendered it necessary for me to refer the case are stated in my order of the 1st February, 1888. The central

reason of the reference was, whether the sale of the pre-emptive share, that is to say, of the rights and interests of Musammat Sakina Bibi during the pendency of the appeal would render the dismissal of the appeal a necessary result. The appeal was admitted on the 12th January, 1887, and its aim and object of course was to have it decreed by this Court that, in respect of the sale of the 25th July, 1885, the plaintiff should have, on the 12th June, 1886, when the first Court dismissed her suit, had her suit decreed instead.

Mr. *Abdul Majid* argued that the sale of Musammat Sakina's rights and interests, which sale took place exactly eight days after the admission of this second appeal, namely, on the 20th January, 1887, was sufficient to deprive her of her pre-emptive right, and for this contention he relied upon the passage to which the learned Chief Justice has referred, namely, the passage at page 535 of the Tagore Law Lectures for 1873, and the passage from the Hedaya to be found at page 562 of Grady's edition of Hamilton's Hedaya, which runs as follows :—

"Besides, it is an express condition of *shuffa*, that a man be firmly possessed of the property from which he derives his right of *shuffa* at the time when the subject of it is sold—a condition which does not hold on the part of the heirs. It is, moreover, a condition that the property of the *shuffi* remain firm until the decree of the *kazi* be passed, and as this does not hold on the part of the deceased *shuffi*, the *shuffa* is therefore not established with respect to any one of his descendants, because of the failure of its conditions."

The learned counsel argued that the passage in the Hedaya meant that actual physical possession of a share, that is to say, of the pre-emptive share, was a condition precedent to the exercise of the right of pre-emption. The translation as made by Mr. Hamilton is somewhat loose, but it is clear that what is intended to be conveyed by the author of the Hedaya was, that, in what I may call the pre-emptive tenement, the pre-emptor should have vested ownership and not a mere expectancy of inheritance or a reversionary right, or any other kind of contingent right, or any interest which falls short of full ownership. For instance, in the

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case of a usufructuary mortgagee who is in possession, the application of the passage would require holding that no right is possessed by such a mortgagee. I do not think that any other interpretation can be placed upon the passage, and I hold also that such is the case-law as shown by some of the reported cases.

Then as to the question, whether a sale such as the sale of the 20th January, 1887, falls within the rule contended for by Mr. *Abdul Majid*, I agree with the learned Chief Justice in holding that we, as a Court of Appeal, are concerned with the question what the decree of the first Court should have been, and not with the matters which have happened since the decree was passed, other than those relating to the array of parties which occurred subsequent to the decree of the Court of first instance. I may say, as I understand the text of the Hedaya, namely, the text at pages 601 and 602, that I have no doubt that although the Muhammadan Law requires that, if by reason of a voluntary sale or other circumstance the pre-emptor before the passing of the decree of the first Court ceases to be the owner of the pre-emptive tenement, then the decree cannot be given in his favour; yet the rule cannot be carried to Courts of Appeal, or Courts of Error, as the Courts concerned with rectification of the decrees of the Courts below. There is also some doubt in my mind whether the passage so far as it relates to sale by a pre-emptor of his pre-emptive tenement before the decree of the *kazi*, is applicable to compulsory sales such as the sale of the 20th January, 1887. The sale may or may not have been validly made. It may possibly be the subject of a separate litigation in the execution department to which execution proceedings the present defendants, Mr. *Abdul Majid's* clients, would possibly be no parties, and the fate of the litigation may be in favour of Musammat Sakina Bibi or against her. Such facts cannot be taken notice of at this stage in a litigation, which, if the pre-emptor's case is established, was rightly commenced and should have ended in the decretal of her claim.

In connection with the latter point I think it my duty to refer to the case of *Khuda Bakhsh* v. *Ramlautan Lal* (1) in which a Division Bench of this Court held that, because subsequent to a

(1) *Weekly Notes*, 1884, p. 109

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decree for pre-emption, and during the pendency of the appeal, in a totally separate litigation a decree had been passed which directed that the pre-emptor was not entitled to the pre-emptive tenement, namely, the tenement which gave him the right to sue, therefore such adjudication deprived such pre-emptor of his pre-emptive right and rendered the decree for pre-emption null and void. The case is not on all fours with the present case. If the case were applicable to this case I should have very great hesitation in holding that it was correct law. The rule of *lis pendens* is a broad doctrine, and the maxim *pendente lite nihil innovetur* is sufficiently broad to invest this question with some difficulty.

This case has not been tried upon the merits, and there are other questions in the case to which I have not referred, because I agree in the order of the learned Chief Justice that the case should go back under s. 562, of the Civil Procedure Code and be tried on the merits by the lower appellate Court, which Court should frame a decree such as the findings may require.

Costs to abide the result.

Cause remanded.

Before Mr. Justice Straight and Mr. Justice Mahmood.

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May 2.

ANGAN LAL (PLAINTIFF) v. GUDAR MAL AND ANOTHER (DEFENDANTS).*

Execution of decree—Deceased Judgment-debtor—Execution against a person not the legal representative.

The defendants, along with one *N* and *C*, had brought a suit against one *A* in the Civil Court at Peshâwar in the Panjâb and obtained a decree on the 23rd July, 1878, for Rs. 30,545-12-0. In 1881 application for transfer of the decree to the Court at Moradabad for execution was made, and it was granted, but no steps were taken thereupon. On the 12th June, 1883, *A* died. On the 30th April, 1884, the defendants again applied to the Court at Peshâwar treating their judgment-debtor as being then alive, for a fresh certificate to execute their decree in the Moradabad district, and obtained it. On the 20th of August, 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it, it was stated that the application was "for execution against Ajudhia Prasad and after his death against Angan Lal, the own brother, and Durga Kuar, widow, and Luchman Prasad and others, sons of Ajudhya Prasad, residents of Kunderkhi and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors." It was further stated that "the judgment-debtor was dead, and his heirs are living and in possession of his estate, and Angan Lal

* First Appeal No. 198 of 1886, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 16th September, 1886.

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himself has realised Rs. 9,687-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and appropriated the same, therefore to that extent the person of the said Angan Lal was liable." Notification of this application was issued to Angan Lal as also to the other persons named therein. Angan Lal objected to the application as against him, stating that, although he was the brother of *A*, deceased, yet he always lived separate and carried on business separately; that there was no connection or partnership between him and the deceased judgment-debtor, and that he had no property of the deceased in his possession. Further, that as *A* left issue, it was wrong to call him as heir to *A*, and take out execution process against him. In reply to these objections the judgment-creditors (defendants) did not contend that Angan Lal was the legal representative of the deceased judgment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased, and therefore liable to the extent of the sum so received by him. The Subordinate Judge, holding that Angan Lal was the brother of the deceased, and had realised the amount from the Commissariat office, which he failed to prove that he paid to the deceased, ordered execution to proceed against him. Angan Lal then instituted this suit to set aside the order of the Subordinate Judge. It was contended first, that the suit was in effect a suit under s. 283 of the Code of Civil Procedure and therefore barred as not having been brought within a year from the order of the Subordinate Judge, and secondly, that the proceedings of the Subordinate Judge were held under s. 244 of the Code and therefore no separate suit would lie.

Held, that the first contention must fail, inasmuch as an essential condition precedent to a suit under s. 283 of the Code, is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made into such objection, and lastly, of its being allowed or disallowed, and these do not exist in this case. The second contention also must fail, as the Subordinate Judge never treated the proceedings in execution against Angan Lal upon the footing that he was the legal representative of the deceased judgment-debtor.

Mirza Mahomed Aga Ali Khan Bahadur, v. *Balmukund* (1), *Sayid Nadir Hossain*, v. *Bipen Chund Bassarat* (2) were referred to.

The facts of this case are stated in the judgment.

Hon. *T. Conlan* and Hon. Pandit *Ajudhia Nath* for the appellant.

Mr. *G. E. Ross* and Pandit *Sundar Lal*, for the respondents.

STRAIGHT, J.—The suit to which this appeal relates is one of a peculiar character, and it is necessary for the purpose of making intelligible the view at which I have arrived to state as succintly and clearly as I can the circumstances under which the plaintiff comes into Court. It appears that the defendants in the present suit, along with one Narain Das and Chela Ram, brought a suit against one Ajudhia Prasad in the Civil Court in the Panjáb and

(1) L. R., 31 A., 241. (2) 3, C. L. R., 437.

obtained a decree against him on the 23rd July, 1878, for a sum of Rs. 30,545-12-0. That was a simple money-decree. In the year 1881 an application was made to the Panjáb Court for a certificate to transfer the execution of that decree to Moradabad in these Provinces, and the application was granted. But nothing further was done in the matter. Upon the 12th June, 1883, Ajudhia Prasad, the judgment-debtor, died. On the 30th April, 1884, very nearly six years after the decree had been originally passed, the defendants, in the name of Damodar Das, who was the original decree-holder and was then also dead, came into the Panjáb Court and applied for a fresh certificate for the transfer of the execution of the case to Moradabad, and upon that date the certificate was granted. It is to be noticed, at least so I understand Mr. *Conlan*, that in that application to the Panjáb Court, Ajudhia Prasad was treated as still being alive. However, whatever informality there may have been in that application, on the 20th August, 1885, a formal application was presented in the Court of the Judge at Moradabad and it was for the execution of this decree which had been transferred. It said:—"Application for execution against Ajudhia Prasad, and after his death against Angan Lal, the own brother, and Musammat Durga Kuar the widow, Lachman Prasad, the major son, and Brijbasi Lal, Makut Behari Lal, and Kunj Behari Lal, minors, under the guardianship of Musammat Durga Kuar, their own mother in their own capacity, as the legal representatives of Ajudhia Prasad, the original judgment-debtor, deceased, residents of Kundarkhi, pargana Bilari, in the district of Moradabad, and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors."

In that petition the following statement was made:—"Although in the decree the names of Narain Das and Chela Ram are included, yet a separation of the demand due to Narain Das has been separately made, and we the decree-holders are separate; and this certificate in respect of money due to us, as decree-holders, has alone been given. Inasmuch as the judgment-debtor has died and his heirs are living and in possession of his property, and Angan Lal himself has realized Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and

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has appropriated the same, therefore to that extent the person of the aforesaid Angan Lal is also responsible. The decree-holders pray that, after issuing the usual orders, the decretal money may be recovered by means of the attachment and sale, and that for the purpose of execution the case might be transferred to the Subordinate Judge."

That petition, as I have said, was filed in the Court of the Judge on the 20th August, 1885, and under his order was transmitted to the Subordinate Judge for execution. Notifications of the petition were conveyed to the present plaintiff Angal Lal, as well as to the other persons mentioned therein, and upon the 7th October, 1885, Angan Lal filed objections, which I need not travel through at length. It is sufficient to call attention to the 3rd and 4th paragraphs, in which he says as follows:—"Although the objector is own brother of Ajudhia Prasad, deceased original judgment-debtor, yet he always lived separate, even during the life-time of his parents, from the said judgment-debtor, and he followed his business separately. In the same way Ajudhia Prasad, the deceased judgment-debtor, used to live and work separate from the objector, who used to live upon what he earned from service, and the judgment-debtor himself was without any property—a thing which has been determined by this Court on several previous occasions. That there was no connection or partnership of the objector with Ajudhia Prasad deceased, neither any property belonging to Ajudhia Prasad is in possession of the objector. Inasmuch as Ajudhia Prasad has left issue, it is wrong on the part of decree-holders to call objector as heir to Ajudhia Prasad and to get execution process issued in his name in the presence of the deceased's male children."

Such was the way in which the plaintiff met the application of the decree-holders for execution against him, and it is quite clear upon the terms of these two paragraphs, that I have read, that the position taken up by him was that he was not the heir or legal representative of his deceased brother, and that it was erroneous on the part of the decree-holders-petitioners to ask the Subordinate Judge to bring him into the execution proceedings as the legal representative of the deceased judgment-debtor as provided for

in s. 234 of the Civil Procedure Code. To these objections of the plaintiff Angan Lal, answers were filed by the decree-holders-petitioners, and it is plain from the terms of their answer that they practically threw overboard the notion that Angan Lal was in any sense a person standing in the position of the legal representive of their deceased judgment-debtor, but they treated him upon the footing of being a person, who was in possession of a sum of money belonging to the deceased judgment-debtor. Indeed, in the 4th paragraph of their answer they say in terms: "The plea of the objector that he was separate from Ajudhia Prasad does not strengthen his position. As the objector has realized and appropriated the money due to Ajudhia Prasad, he is certainly liable to the extent of the money realized by him."

Such was the petition, such the objection of Angan Lal, and such the reply to the objection of Angan Lal on the part of the decree-holders, and upon those materials the Subordinate Judge proceeded to pass an order dated the 27th March, 1886. Now it is plain to my mind from the terms of that order, that the Subordinate Judge dealt with the proceedings before him, not upon the footing of determining a question under s. 234 of the Civil Procedure Code, as to the responsibility of a legal representative in respect of a deceased judgment-debtor, but he disposed of it upon the single and simple ground, that so far as the materials before him enabled him to form an opinion, it was established that money had been received by Angan Lal, which he had not paid over to his deceased brother and therefore he was responsible. Thus the Subordinate Judge was, by the summary method of an execution proceeding, trying a question as to whether money was or was not due to the estate of a deceased person by a third party, who was outside the decree and who was not brought in, in the character of a legal representative. In dealing with the matter in that way the Subordinate Judge acted without jurisdiction, and he had no right whatever to decide anything as to a person, who stood in the position of a stranger, or to hold that such stranger was liable to have the decree executed against him, as if he was the representative of the deceased judgment-debtor.

That order of the Subordinate Judge is the foundation of the present claim by the plaintiff, and as I understand the relief

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sought in his plaint and the scope of his suit, the only object he had in view was to get rid of that order. It is not denied by Mr. *Conlan*, on the contrary it is conceded, that if the plaintiff Angan Lal was separated from his brother as there seems to be no doubt, and if he had received a sum of money for his brother which he had not paid over, there was provision in the Civil Procedure Code under which the judgment-debtor might have realized that money from him. But he could not do so by a proceeding in which the plaintiff could not be a party, and the order made in regard to him was bad as being passed without jurisdiction.

The only way in which it is met by the respondent is, first, that this suit must be tried and disposed of on the ground that it is in effect nothing more or less than a suit under s. 283 of the Civil Procedure Code, brought by the plaintiff to get rid of the order of the 27th March, 1886, and as such, barred by one year's limitation. I dissent from that view. An essential condition precedent to the institution of a suit under that section is the making of an attachment of some immoveable property, of objection being taken to such attachment, of investigation being made into such objection in the manner provided in Chapter XIX of the Civil Procedure Code, and lastly, of its being allowed or disallowed, with the consequential right of the party damnified to bring a suit within a certain period of time. In the present case there has been no attachment, there has been no investigation of any objections in the sense of the chapter to which I have referred, and there has been no disallowance of those objections. This seems to me to answer the first objection of the defendants-respondents.

The second objection taken by the respondents is this:—These proceedings of the Subordinate Judge must be regarded as held under s. 244 of the Civil Procedure Code, and so no separate suit lies. But as I have already remarked, the Subordinate Judge never tried the action upon the footing of the present plaintiff being the legal representative of the deceased judgment-debtor within the meaning of s. 244. On the contrary, he dealt with him throughout in a totally different character. Mr. *Conlan* has called our attention to a ruling of their Lordships of the Privy Council in the case of *Mirza Mahomed Aga Ali Khan Bahadoor* v. *The widow of*

Balmakund, (1) and he has also referred us to a ruling in the case of *Syed Nadir Hossein* v. *Bissen Chand Bassarat* (2). Both those cases are very apposite to the matter before us. The ruling of the Privy Council seems to me directly in point, and if I understand it aright, it lays down the principle, which, if adopted, would have warranted the present respondent in attaching the alleged sum of money in the hands of the plaintiff as being due to the estate of the deceased Ajudhia Prasad in the ordinary manner provided by the law. That procedure might have resulted in objection being taken by the present plaintiff, and the ordinary machinery would then have been followed. But the respondents did not think proper to adopt that course. They sought through the machinery of the execution department, by a wholly erroneous proceeding, to enforce payment by the appellant of a sum due to the judgment-debtor, and as their proceeding was not only irregular but illegal, the order of the Subordinate Judge cannot possibly be sustained. Under these circumstances this appeal should be decreed, and the plaintiff should obtain a decree declaring that the Subordinate Judge's order of the 27th March, 1886, is of no effect so far as it professes to give execution of the decree of the 23rd July, 1878, against the plaintiff-appellant Angan Lal. The plaintiff will be entitled to his costs in all the Courts.

MAHMOOD, J.—I am of the same opinion.

Appeal decreed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

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May 4.

GHANDHARAP SINGH AND OTHERS (PLAINTIFFS) *v.* LACHMAN SINGH AND OTHERS (DEFENDANTS).*

Hindu widow—Adverse possession against widow—Reversioners—Act XV of 1877 (*Limitation Act*), *sch.* ii, *Nos.* 141, 144.

The plaintiffs sued for possession of certain zamíndári property as reversioners to the estate of one *C*, their right to sue having accrued as alleged on the death of the widow of *C*, which took place on 14th October, 1884. The defendant, alleging himself to be the adopted son of *C*, and being in possession of the property in dispute since the death of *C*, which happened in 1869, contended that the claim was barred. The Court of first instance dismissed the claim as barred by art. 118 of the Limitation Act, and in appeal the District Judge held the claim was barred by defendants' adverse posses-

* Second Appeal No. 2200 of 1886, from a decree of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 6th September 1886, confirming a decree of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 26th March, 1886.

(1) L. R., 3, I. A., 24. (2) 3, C. L. R., 437.

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sion over the property for more than twelve years. On second appeal it was contended that the suit being by a Hindu entitled to possession as a reversioner on the death of a female, was governed by art. 141 of the Act and therefore not barred. *Held*, that as on the facts found the adopted son held adversely to the widow, adverse possession which barred the widow barred also the reversioners and therefore the claim was barred. The *Shiva Ganga Case* (1) was referred to.

The following cases were cited in the course of the argument, *Raj Bahadoor Singh* v. *Achambit Lal* (2), *Jagadamba Chowdhrani* v. *Dakhina Mohun* (3), *Rajendronath Holder* v. *Jogendro Nath Banerjee* (4).

THIS was a suit for possession of shares in certain zamíndári property. There were four brothers, Pertab Singh, Jowahir Singh, Adhar Singh, and Bhup Singh. Pertab Singh adopted Mannu Singh, a son of Jowahir Singh, and Bhup Singh adopted Chittar Singh a son of Adhar Singh. On the death of Bhup Singh, the names of his widow Paran Kuar and his adopted son Chittar Singh, were recorded, each in respect of one anna share in the zamíndári property left by him.

Chittar Singh died in 1869, leaving a widow, Dulari Kuar, and her name was entered in respect of the aforesaid one anna share of Chittar Singh and also of a two anna share in other zamíndári purchased by Chittar Singh. Dulari Kuar died on 14th October, 1884, and the plaintiffs in the suit, who are some of the descendants of Mannu Singh and sons and grandsons of Jawahir Singh, applied to the Revenue Court for entry of their names in respect of the property that stood in her name; but on the objection of one Lachman Singh, son of Nokhi Singh and grandson of Adhar Singh, that he was the adopted son of Chittar Singh, they were referred to the Civil Court to establish their right to inherit the estate of Chittar Singh and hence the suit. Paran Kuar admitted that Lachman Singh had been adopted by Chittar Singh.

Lachman Singh contended that the claim for declaration that his adoption never took place was barred by the six years' rule of limitation; that he had been in adverse possession for more than twelve years, and that he was duly adopted by Chittar Singh as his son.

The plaintiffs had stated in their plaint that the alleged adoption of Lachman Singh had become known to them prior to the

(1) IX, Moo. I. A., 543.
(2) L. R., 6, Ind., Ap. 110.
(3) L. R., 18, Ind., Ap. 84.
(4) 14, Moo., I. A., 67.

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year 1873, when partition proceedings were pending in the Revenue Court for partition and division of the family zamíndári villages to which Lachman Singh was a party, and which ended in the direction by the Revenue Court that the parties should first settle the question of their respective rights by an adjudication of the Civil Court.

The Subordinate Judge being of opinion that the suit was practically one for declaration that the adoption never took place, held that it was barred by six years' rule of limitation. He also found that Lachman Singh was the legal heir of Chittar Singh, and had been in adverse possession of the property in suit for more than twelve years since the death of Chittar Singh. The suit was accordingly dismissed.

In appeal the District Judge held that the suit being for recovery of possession of immoveable property, was governed by the longer period of limitation, *viz.*, that of twelve years, and finding then, that Lachman Singh had been in adverse possession for more than twelve years dismissed the appeal. On second appeal it was contended that the suit being of the nature described in art. 141 of the Limitation Act, was instituted within the time allowed by law.

Mr. *Colvin*, Hon. *T. Conlan*, and Munshi *Kashi Prasad*, for the appellants.

Mr. *G. E. Ross*, Hon. Pandit *Ajudhia Nath*, and Pandit *Moti Lal*, for the respondents.

STRAIGHT, J.—The suit to which this appeal relates is one which on the face of it professes to be brought by the reversioners of the estate of one Chittar Singh, their right to maintain their present claim having, it is alleged, opened up to them upon the death of one Musammat Dulari, who departed this life upon the 14th October, 1884. The case for the defendants was that Chittar Singh, prior to his death in 1869, had adopted the defendant Lachman Singh as his son, and that upon his death Lachman Singh entered into possession and enjoyment of his property, to which the suit related, to the exclusion of his adoptive mother Dulari Kuar, who never held possession of it as an estate of the widow of a separated childless Hindu. In other words, what the

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defendants asserted was that from the date of the death of Chittar Singh, his adopted son, the defendant Lachman Singh took and held possession of the property left by him adversely to Dulari Kuar. Supposing that Musammat Dulari had taken the estate of the widow of a deceased childless Hindu, and nothing had intervened to disturb her possession of that estate of the kind I shall presently refer to, the plaintiffs would, no doubt, have been entitled to come into Court with their suit, and it would have been governed by art. 141 of the Limitation Law. But it has been conceded by Mr. *Colvin*, and I think rightly, that if the defendant Lachman Singh had obtained and held adverse possession as against the widow for more than 12 years prior to the date of the institution of the suit, that adverse possession as against her is good as against the reversioners; and as authority for that position I have only to refer to the well-known declaration of their Lordships of the Privy Council in the *Shiva Gunga Case*. (1) Reference has been made in the course of the argument to three cases. One of those was the case of *Raj Bahadoor Singh* v. *Achumbit Lal* (2) another was the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun* (3), and the last is the case of *Rajendro Nath Holder* v. *Jogendro Nath Banerjee* (4).

Now as to the first of those cases, the remarks of their Lordships in the second of them, namely, the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun* (3) explain what the nature of that suit was, and they indicate in unmistakeable language what meaning is to be attached to a particular passage used in the judgment about which misconception had arisen. In that case all that their Lordships did decide was that under the old Limitation Act, IX of 1871, art. 129, upon a particular state of facts, that article applied, and they specifically say in the course of their judgment that they do not profess to decide whether "the articles of the new law, Act XV of 1877, namely, arts. 118 and 119, denote a change of policy or how much change of law it affects, because those questions were not before their Lordships."

In the third case relied upon by Mr. *Colvin*, their Lordships of the Privy Council, upholding the decision of a lower appellate

(1) IX, Moo. I. A. 543.
(2) L. R., 6, Ind., Ap. 110.
(3) L. R., 13, Ind., App. 84.
(4) 14, Moo., 1 A. 67.

Court upon a peculiar and special state of facts, in reference to that case held that no limitation article applied to bar that suit.

It is not necessary for me to decide here whether even if there had not been such a finding as has been recorded by the learned Judge in this case, and there were no materials to show that adverse possession of the estate of Chittar Singh had been obtained by the defendant, Lachman Singh, but it appeared that an adoption had been asserted at the death of Chittar Singh, two remedies might not have been open to the plaintiffs, that is to say, one of a purely declaratory kind, such as is covered by art. 118 of the Limitation Act, when such alleged adoption became known to the plaintiffs, or a suit in the present form on the death of the widow. I think there is much force in what was said by my brother Oldfield on this subject in the case of *Basdeo* v. *Gopal* (1), but the state of the findings by the learned Judge in this case render it unnecessary to consider this question, and they are as follows :—

"Plaintiffs had full notice in 1869 A. D. that Dulari made no claim to the estate ; that she never asserted that the estate had at any time vested in her ; on the contrary, she alleged that on the death of Chittar Singh, the estate vested in a son adopted by him in his life-time, and that she was only managing during the minority of the adopted son and for his benefit, he being in full possession by right of inheritance from his adoptive father."

That is a most specific and clear finding to this effect, that upon the death of Chittar Singh, Lachman Singh was by the direct act of the widow notified to every body, as a person who was the adopted son of her deceased husband, Chittar Singh himself ; that he was in possession, not as the son adopted by her in pursuance of any authority conferred on her by her husband, whom she had put into possession, but by direct inheritance from Chittar Singh. It seems to me that the learned Judge having found those facts was distinctly right in saying that there was on the part of the minor Lachman Singh, now major defendant, clear evidence of adverse possession to the widow and to any other person, who had any claim or interest, under or through her, in the property, which has continued down to the present time, and which was obviously for a much longer period than twelve years.

(1) I. L. R., 8, All., 644.

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That being so, although Mr. *Colvin* has addressed us very ably in regard to the findings of fact of the learned Judge, I am of opinion that we cannot go behind those findings, and that upon them the learned Judge has properly held that the suit of the plaintiffs not having been brought within twelve years from the date when the defendant first obtained adverse possession, it must be dismissed, Lachman Singh having acquired a good prescriptive title thereby. I therefore dismiss the appeal with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

1888
May 9.

RAM LAL AND ANOTHER (DEFENDANTS) *v.* DEBI DAT AND ANOTHER (PLAINTIFFS).*

Hindu Law—Joint Hindu family—Evidence of separation—Definement of shares in ancestral property.

A four anna ancestral share in a zamindari village was owned by two brothers, in which the share of *H*, son of one of the brothers, was one-half, the remaining half being the share of the plaintiffs the descendants of the other brother. In the village records there has been a definement of shares followed by entries of separate interests in the revenue records, and since 1264 fasli the two plaintiffs have each been recorded as the owner of a one anna share and *H* of a two anna share thereof. The entire four anna share has been in the possession of mortgagees from the year 1844, excepting the sir lands of which H. held separately his own share, *viz.*, 10 bighas. On the 7th July, 1883, *H* executed a deed of gift of his two anna share in favor of the defendants, and caused mutation of names to be made in their favor surrendering to them at the same time possession of the sir land. *H* died on 21st January, 1884, leaving neither son, widow, nor daughter, and the plaintiffs were his heirs at law. They brought this suit to set aside the deed of gift and for possession of the sir land from the defendants. The suit was dismissed by the Court of first instance, and in appeal the District Judge affirmed the decree, holding that the four anna share was not joint and undivided property between the co-sharers, and that *H* was in separate possession of the two anna share of which the defendants were the donees. On second appeal it was contended, that in as much as since 1844 there could have been no separate enjoyment of the four annas which was in the possession of the mortgagees, the evidence afforded by separate registration could not prove actual separation. *Ambika Dat* v. *Sukhmani Kuar* (1) was cited in support of the contention.

Held, that from evidence of definement of shares followed by entries of separate interests in the revenue records, if there be nothing to explain it, separation as to estate may be inferred. Joint family property in the hands of mortgagees may be separated in estate, although there could be no separate enjoyment of the shares so separated.

* Second appeal No. 2310 of 1886, from a decree of J. Deas, Esq., District Judge of Jaunpur, dated the 2nd August, 1886, confirming a decree of Maulvi Nasar-ulla Khan, Subordinate Judge of Jaunpur, dated the 11th August, 1884.

(1) I. L. R. 1. All. 437.

Ambika Dat v. *Sukhmani Kuar* (1), discussed.

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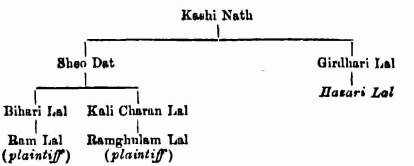
THE following genealogical table explains the relationship of the plaintiffs in this case with Hazari Lal, deceased, whose estate was the subject-matter of dispute:—



Sheo Dat and Girdhari Lal owned a four anna share in a village called Tukha. Hazari Lal's share in this four anna estate was one-half, the remaining half being the share of the plaintiffs.

On the 7th July, 1883, Hazari Lal executed a deed of gift of his share in favour of the defendants in this case. At this time the four anna share, but not the *sir* land belonging thereto, was in the possession of mortgagees, and had been so since 1844. Hazari Lal caused mutation of names to be recorded in favour of the defendants, surrendered possession of his *sir*-land, and died on the 21st January, 1884, leaving neither son, widow nor daughter. The plaintiffs were therefore his heirs under Hindu law. They brought this suit to cancel the deed of gift mentioned above, and for possession of the *sir*-land, 9 bighas odd. They alleged, amongst other things, that the four anna share was joint undivided property; that Hazari Lal lived in union with them; and that therefore the alienation was void under Hindu law. The defendants traversed all these allegations.

The Court of first instance dismissed the suit. The plaintiffs appealed to the District Judge. The District Judge dismissed the appeal. The first issue which he framed for determination was "whether Hazari Lal, at the time of the execution of the deed of gift, was in the separate possession of his share of the ancestral property." On this issue the Judge found as follows:—"In *Appovier* v. *Ramasubha Aiyan* (2), their Lordships of the Privy Council have ruled that when the members of an undivided family agree among themselves with regard to particular property that it

(1) I. L. R., 1, All., 487. (2) 11 Moo., I. A., 75.

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shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a certain and definite share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided, "division" having a twofold meaning, division of right and division of property. In *Adi Deo Narain Singh* (1) it was held that the plain principle deducible from the above ruling is, that in order to show separation it is not necessary to establish a partition of the joint estate into separate shares or holdings; it is enough that there has been ascertainment and definition of the extent of right and interest of the several co-sharers in the whole, and of the proportion of participation each of them is to have in the income derived from the property, to effect a severance and destruction of the joint tenancy so to speak, and to convert it into a tenancy in common.

"In this case it is clear from the copies of village-record filed that there has been a definement of shares followed by entries of separate interests in the revenue-records. Since 1264 fasli Kali Charan has been recorded as the owner of a one anna share, Ram Lal of a one anna share, and Hazari Lal of a two annas share, the *jamá* payable by each being separately recorded, Kali Charan being the lambardar of the four annas share.

"The fact that there was a definement of shares between Kali Charan, Ram Lal, and Hazari Lal, followed by entries of separate interests in the revenue-records of the village, goes far towards proving separation of title and interests, but does not necessarily amount to such separation. It must be shown that there was an unmistakable intention on the part of the share-holders to separate their interests, and that the intention was carried into effect.

"The oral evidence is, as usual, conflicting; the statement of the plaintiffs' witnesses that Hazari Lal and his cousin Kali Charan and nephew Ram Lal lived in commensality, and were joint owners of the undivided four annas share, and *sir*-lands being contradicted by the defendants' witnesses. It appears to me, however, to be

(1) I. L. R., 5, All., 532.

proved that Hazari Lal lived latterly in mauza Takha; that he died in the defendants' house in that village; that the funeral obsequies (*kirya karam*) were performed by the defendants; and that the plaintiffs lived in mauza Bhadi.

"The whole of the four anna share it seems has been for very many years in the possession of a mortgagee. The *sir*-lands, 20 bighas, were however, not mortgaged.

"The witnesses for the plaintiffs say that the *sir*-lands were jointly cultivated, partly home cultivation, and partly through *shikmis*. On the other hand, the witnesses for the defendants say that Hazari Lal held separately his own share of the *sir*-lands, the bighas 10 in suit. The Judge then referred to the oral and documentary evidence, and continued as follows:—

"It is urged on behalf of the plaintiffs that the four annas share was jointly mortgaged to Bhagwan Das, and that therefore the joint undivided nature of the property is thereby proved. The debt, however, which led to the mortgage was an old ancestral one, and as pointed out by the lower Court, the fact that the creditor took a joint mortgage of their property from the representatives of the original debtor or debtors does not *per se* prove that the property mortgaged was a joint and undivided one.

"Considering that the recorded definement of shares was accompanied by a separation and division of the *sir*-lands, as is proved by the revenue-records of 1264 and 1272 fasli; that Hazari Lal for some years before his death lived with the defendants in Takha, and not with the plaintiffs in Bhadi; that as stated by one of the plaintiffs' own witnesses he had ceased communicating with the plaintiffs two years prior to his death; that he died in Takha apart from the plaintiffs and that the "*kirya karam*" or funeral obsequies were not performed by the plaintiffs, I must hold that the decision of the lower Court is correct, that the four annas share was not joint and undivided property, and that Hazari Lal was in separate possession of the two annas share which was given by him to the defendants. The plaintiffs, his nephews, by Hindu law cannot therefore impeach the alienation, the property alienated being held in severalty."

The plaintiffs appealed to the High Court.

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RAM LAL v. DEBI DAT.

Hon'ble *T. Conlan*, Mr. *G. Gordon*, and Babu *Bishnu Chandra Moitro* for the appellants.

Hon'ble Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This was an appeal from the decree of the District Judge of Jaunpur, who held on appeal that there had been separation in fact in this Hindu family. The defendants were grantees from one Hazari Lal. If there had not been a separation, the plaintiffs would be entitled to a decree. If there had been separation the gift to the defendants was unimpeachable. The Judge of Jaunpur appears to me to have correctly apprehended the law as to separation and to the inferences which may be drawn as to separation. The property in dispute was a two annas share out of a four annas share in the village. The four annas share had been since 1844 in the hands of mortgagees, who had held it under a *sarpeshgi* lease, which had been renewed from time to time. The last lease was granted on the 23rd July, 1871. We are informed that in consideration of such renewals further sums were borrowed. It has been contended before us that inasmuch as there could have been since 1844 no separate enjoyment of the four annas share of the mortgaged property, the evidence afforded by the separate registration could not prove actual separation. I may mention that there was the evidence of Hazari Lal, who said he had separated; that evidence, if believed, would be sufficient.

The point which has been pressed on us was based on a judgment of this Court in the case of *Ambika Dat* v. *Sukhmani Kuar* (1). Mr. Justice Turner in delivering the judgment of the Court said:—"The fact that there was a definement of shares followed by entries of separate interests in the revenue-records in some estate only is an important piece of evidence towards proving separation of title and interests, but it will not necessarily amount to such separation; it must be shown that there was an unmistakable intention on the part of the share-holders to separate their interests, and that the intention was carried into effect. The best evidence is separate enjoyment of profits and dealings with the property." It has been assumed in the argument on behalf of the

(1) I. L. R., 1, All., 437.

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appellants that the meaning of that judgment is that in no case can separation be found unless there is evidence of a separate enjoyment of profits. We do not think that is the meaning of the judgment. In fact, in the passage quoted, the learned Judges say: "a definement of the shares followed by entries of separate interests in the revenue-records in some estate only is an important piece of evidence towards proving separation." From evidence of that kind, in our judgment, if there is nothing to explain it, separation as to the estate in respect of which there has been a definement of shares followed by entries of separate interests in the revenue-records may be inferred. If the case now before us had been before those learned Judges, they would probably have so worded their judgment that no one might infer that in all cases proof of separate enjoyment of profits was absolutely necessary. To hold that there could be no separation proved in the case of property in the hands of mortgagees unless proof could be given of separate enjoyment, would be to hold that a joint family whose sole property was in the hands of mortgagees could not, during the currency of the mortgage, effect or prove separation. We think that the learned Judges in the case to which we have referred were only dealing with the case before them, and did not intend to lay down rules of universal and exclusive application. This is a second appeal. The Judge in our opinion has shown by his judgment that he perfectly understood the law. There was documentary and oral evidence before him to prove the separation, and we cannot in second appeal question the findings of fact: we dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

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May, 10.

KANHIA (PLAINTIFF) *v* MAHIN LAL (DEFENDANT).*

Hindu widow—Gift of immoveable property by husband—Life-interest—Heritable interest—Alienable interest—Appeal—Practice—Change of pleading in appeal.

The plaintiff, alleging himself to be joint in estate with *A*, his grand-uncle, sued to set aside an absolute gift of the house in suit made by *A* in favor of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower appellate Court, finding that *A* was separate in estate from plaintiff and the sole and exclu-

* Second Appeal No 42 of 1887 from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Agra, dated the 25th November, 1886, reversing a decree of Babu Baij Nath, Munsif of Agra, dated the 8th April, 1886.

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sive owner of the house held, the gift to the wife and the sale by her to defendant valid and dismissed the suit. On appeal to this Court plaintiff contended that he was the heir of the donee and that under the deed of gift she had no power to alienate.

Held, that the case put forward in second appeal being totally different from that which was originally put forward and tried, the appeal should be dismissed.

Held further that from the wording of the deed of gift it appeared that the husband intended to give and did give to his wife an heritable estate in and power of alienation over the property the subject of the gift and therefore the sale by the wife was valid.

Kunjbehari Dhar v. *Prem Chand Datt* (1) referred to.

Aman Singh, a Hindu, made an absolute gift of a house of which he was the owner to his wife Ramo. In the deed he said:—"I, my issues, relations, shall have no claim in respect of the house against the donee or her heirs, and if any of my heirs does so the claim shall be false." Upon the death of Aman Singh, his widow, on the 24th December, 1885, sold the house to the defendant Mahin Lal. Plaintiff as grand-nephew of Aman Singh, alleging himself to be joint in estate with him, instituted the suit to set aside the gift made by him to his wife and also to eject the defendant purchaser from the widow from the house.

The Munsif, holding that Aman Singh was competent to make a valid gift of the house to his wife, observed that she had no larger power to alienate it than if she had inherited it from her husband, and decreed that the gift to the wife and the sale by her were only valid during her lifetime and would not affect the reversionary rights of the plaintiff.

On appeal the learned Subordinate Judge found that Aman Singh was separate in estate from plaintiff and the sole and exclusive owner of the house in dispute, and therefore had a perfect right to make an absolute gift to his wife, which he did, and that his wife was free to exercise her uncontrolled power of alienation over the property in dispute. He therefore dismissed the suit.

On second appeal it was contended that it has not been shown that the house in dispute was the wife's *stridhan*, and that even then she could not absolutely alienate it.

Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellant.

(1) I. L. R., 5, Calc., 684.

Mr. *Abdul Majid* and Pandit *Moti Lal*, for the respondent.

EDGE, C. J.—In this case the plaintiff brought his action to set aside a deed of gift and a deed of sale. The deed of gift was made by the husband of Musammat Ramo in her favour. It was a gift of immoveable property. But the plaintiff alleged as the foundation of his case that the property was the joint family property of her husband and himself or his predecessors, and he claimed to have the deed of gift avoided on the ground that, under the circumstances, the donor could not give the property in question to his wife. He also asked to get possession of the property.

Now it has been found that the property in question was not joint family property, and that it was in fact separate property of the husband. Under the circumstances, the plaintiff failed to prove the case on which he came into Court. He, however, comes here in second appeal, alleging that he is the heir of the donee, and that she had, under the deed of gift, no right of alienation. It is needless to observe that this is a totally different case from the case that he originally made. It involves different considerations of facts and of law. In the case as now put forward questions would arise as to whether the plaintiff was in fact the heir of the donee or whether he was the heir of her husband. However, although I think that the appeal ought to be dismissed on the ground that it is a totally different case from the case which was put forward and tried, I think that even on the case as put before us the appeal ought to be dismissed.

I am of opinion that the donor intended to give and did give an heritable estate and power of alienation to the donee by the deed of gift. He says :—" I, my issues, relations, shall have no claim in respect of the house against the donee or her heirs, and if any of my heirs does so the claim shall be false."

It appears to me that his intention was that he, the donor, should not, nor should any heirs of his, interfere with the enjoyment and disposal of the property the subject of the gift. Jackson, J., in delivering judgment in the case of *Kunjbehari Dhur* v. *Premchand Dutt* (1), said as follows :—

" We understand it to be a rule of law, well established in this Court, that a Hindu wife takes, by a will of her husband, no more

(1) I. L. R., 5, Calc., 684 at p. 687.

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absolute right over the property bequeathed than she would take over such property if conferred upon her by gift during the life time of her husband; and that, whether in respect of a gift or a will, it would be necessary for the husband to give her in express terms a heritable right or power of alienation."

The ruling recognises the conclusion that if the power of alienation is given, the power can be exercised, and it also is consistent with the rule of law laid down in paragraph 571 of Mayne's Hindu Law, 3rd. ed., where the author says :—

"Immoveable property, when given by a husband to his wife, is never at her disposal, even after his death. It is her *stridhanum*, so far that it passes to her heirs, not to his heirs. But as regards her power of alienation, she appears to be under the same restrictions as those which apply to property which she has inherited from a male. Of course it is different if the gift is coupled with an express power of alienation."

I have said that if the power of alienation is given to the wife by the husband in any portion of his separate property, it follows that she has the power to alienate it.

Under the circumstances, I think that the appeal should be dismissed with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

1888
May 14.

Before Mr. Justice Straight and Mr. Justice Mahmood.

RAMPHAL RAI AND OTHERS (DEFENDANTS) *v.* RAGHUNANDAN PRASAD (PLAINTIFF).*

Public thoroughfare—Obstruction—Right to sue—Special damage—Lease—Right of lessee to sue—Trespass.

The plaintiff, a holder of a ten years' lease of the share and rights of one of the co-sharers of a village, sued for the demolition of certain buildings and constructions on a plot of land within the area of the village, on the ground that the public have been very much inconvenienced in going to and coming from the road and in taking carts, carriages, cattle, &c., and that he by reason of his own inconvenience, and also as lessee in possession of the entire rights of his lessor, has legally and justly a right to bring

* Second appeal No. 1371 of 1886, from a decree of Munshi Matadin, Subordinate Judge of Ghazipur, dated the 28th February, 1886, confirming a decree of Maulvi Inamul Huq, Munsif of Ballia, dated the 24th December, 1885.

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the action. The findings of fact were, that by the terms of the lease plaintiff was entitled to maintain the action as representing the zemindari rights of his lessor; that the obstructions complained of existed when the lease was granted; that the roadway mentioned in the plaint was one used by the public in general as a foot-path and also for vehicles, and that the buildings complained of have encroached on the road. The suit was dismissed by the first Court, but decreed in appeal by the lower appellate Court. *Held*, that in the absence of damage over and above that which in common with the rest of the public the plaintiff has sustained, his action must fail. Public nuisance is actionable only at the suit of a party who has sustained special damage, and the case-law of British India in this respect is the same as the rule of English law on the subject. Further, that the lease to plaintiff failed to show either that the land upon which the defendant has built is included in the lease, or that it intended to confer upon the plaintiff any right to question the legality of the erections existing at the time of the lease.

Satku v. *Ibrahim Aga* (1) and *Karim Baksh* v. *Budha* (2) referred to.

The facts of this case are stated in the judgment of the Court.

Mr. *Niblett*, for the appellant.

Mr. *G. T. Spankie*, for the respondent.

MAHMOOD, J.—This case originally came on for hearing before me sitting as a single Judge for the disposal of second appeals, and by my order of the 21st April, 1887, I referred the case, for the reasons stated in that order, to a Division Bench consisting of two Judges. The case was accordingly heard by my brother STRAIGHT and myself, and by his order of the 23rd December, 1887, in which I concurred, my learned brother remanded the case, under s. 566 of the Civil Procedure Code, for the trial of certain issues stated in that order. That order also sets forth the two fold aspects in which the case was presented to us by the argument for the parties on that occasion. The plaintiff is the holder of a ten years' lease from the Maharaja of Dumraon, who is a co-sharer of the village along with defendant No. 3. The lease is a *thika* lease of the zemindari rights of the Mahárája, and it was executed on the 24th January, 1885, conferring upon the plaintiff the right of possession and management of the zemindari share, subject to certain conditions and stipulations which need not be mentioned in detail for the purposes of this case. The cause of action for this suit is stated in the plaint to have arisen on the 6th June, 1883, when the defendant is alleged to have built certain constructions upon a plot of land, No. 788, which is included within the area of the village,

(1) I. L. R., 2, Bom., 459. (2) I. L. R., 1, All., 240.

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and is stated to be a thoroughfare used by the plaintiff as well as by the public.

The present suit was instituted on the 12th August, 1885, and the case of the plaintiff can best be set forth by quoting from the plaint itself. His case is:—"That by reason of building the house, placing a trough, manger, wood, &c., and tying cattle, the width of the passage, which was ten *lathas*, is now left only eight *lathas*: that the public are very much inconvenienced in going to and coming from the road and in taking carts, carriages, cattle, &c.: that the plaintiff by reason of his own inconvenience, also as the lessee in possession of the whole right in the zemindari share of the Mahárája of Dumraon, has legally and justly a right to bring this action." And upon these grounds the plaintiff prayed for the following reliefs:—

"That the house in dispute, the trough, the manger, the wood, &c., built, erected, and placed by the defendants on 1 biswa 18 dhurs of land (bounded as below), part of the passage site No. 788, valued at Rs. 10, be demolished, pulled down, and removed, and the passage site be levelled and restored to its original state and condition; that the defendants be prevented, in future, from making any appropriation for their own use or doing any act injurious to the convenience of the public;" and the plaint ended up by praying "that any other relief which may be just and proper be also granted."

It is clear from this, as was pointed out by my brother Straight in his remand order of the 23rd December, 1887, that the suit has a double aspect; one being that of an action for an injunction to remove a nuisance caused by the obstruction which the defendant's building upon the land has created, and the other aspect being that of an action in trespass founded upon the plaintiff's alleged right as lessee to possession of the land upon which the erections have been made. The suit was resisted in both its aspects.

So far as the first aspect is concerned, the defendant pleaded that the plot of land being a public thoroughfare and no special damage or injury having been alleged by the plaintiff in consequence of the alleged obstruction, the plaintiff could not maintain the suit, the alleged wrong to a right possessed by the plaintiff in common with

the public not being available to him as a sufficient foundation for such an action. Then as to the second aspect of the plaintiff's case, the main defence was that the plaintiff, as a mere lessee, had no *locus standi* to maintain such an action, and that the defendant had been in possession of the land for more than the prescriptive period of twelve years, and the suit was therefore barred by limitation. Further, in respect of both the aspects of the case, the effect of the defence was that the land upon which the defendant had built did not form part of the thoroughfare; that the road had not been narrowed so as to put any one to inconvenience, and that the land on which the defendant had built had from ancient times been in his possession and he had a right to build thereon.

The first Court dismissed the suit, but that decree has been reversed by the lower appellate Court mainly upon the ground "that the constructions have not been in existence for more than twelve years;" "that the houses are new and have been built without the permission and consent of the zemindar;" that the plaintiff could maintain the action "as the representative of the zemindar;" that "it is proved by the evidence that the passage is narrower than before, since formerly three carts used to pass through it, now only one cart can pass, and therefore, if another cart comes from the other direction, inconvenience will surely occur."

In pursuance of my brother Straight's remand order of the 23rd December, 1887, the findings of the lower appellate Court in effect are that the terms of the *thika* lease of the 24th January, 1885, entitled the plaintiff to maintain such an action as representing the zemindari rights of his lessor; that the obstruction or constructions complained of by the plaintiff were erected antecedent to the lease and were in existence at the time when that lease was executed; that "the way referred to by the plaintiff in his plaint is a roadway used by the public in general on foot and with vehicles;" that the house and other buildings have encroached upon the road, and "for this reason the plaintiff complains in his petition of plaint that, besides the injury caused to the public who use this way, the plaintiff's passage along the road and that of his carts, cattle, &c., has been obstructed."

These findings have not been contested by either party under s. 567 of the Code of Civil Procedure, and taking all the findings

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of fact upon which the lower appellate Court has proceeded, I shall deal with the case upon pure questions of law in the two aspects of the suit stated in my brother Straight's order of remand.

First, then, as to the question whether the plaintiff could, upon the allegations contained in the plaint, maintain this action for removal of an alleged obstruction erected upon land which has been found to form part of a public thoroughfare. For the purpose of deciding this part of the case it is not necessary to consider the plaintiff's right as lessee under the *thika* lease of the 24th January, 1885, for he to that extent comes into Court as one of the public entitled to use the thoroughfare. It is a settled proposition of the English law of torts that obstructions in a public thoroughfare are not actionable as creating a civil liability, unless some particular or special damage or injury is proved to have resulted to the individual person or the determinate body of persons maintaining the action. Such obstructions, being in a public thoroughfare, are classed as public nuisances, falling under the same category as many other kinds of public nuisances which need not be referred to for the purposes of this case. But the principles upon which the English law of tort proceeds in respect of all the multifarious classes of public nuisances are identical, and those principles do not so much relate to the right as to the form of the remedy. In England and also in America the erection of obstructions in a public thoroughfare are indictable offences under the criminal law; and our own Indian Penal Code, in following the same principles, has virtually defined a public nuisance in s. 268, and has rendered the same punishable as a criminal offence. The Criminal Procedure Code also makes provision for summary proceedings by Magistrates to stop such nuisances. But upon the question whether such public nuisances are in themselves sufficient to sustain a civil action, the statute law, so far as I am aware, is totally silent, and it therefore devolves upon Judges sitting in British India virtually to legislate, by judicial exposition, for the people of the country, under the authority of the somewhat indefinite rule of justice, equity and good conscience, which has to be administered, in the absence of any legislative directions, by the Courts of Justice in British India. Such is virtually the effect of the present state of the law of tort in British India, resulting as

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might well be expected, in a vast conflict of decision on various questions of civil liability *ex delicto*. The practice of the Courts in British India, the highest of which have been presided over by English lawyers, has, however, been to fall back upon the analogies of the English law, and to take it in all cases to be a good guide for applying the rule of justice, equity, and good conscience. This method has, in the absence of any definite rules of law governing actions *ex-delicto* or other classes of litigation, been approved by the Lords of the Privy Council, and probably the latest *dictum* of their Lordships is contained in *Waghela Rajsanji* v. *Masludin* (1), where, however, their Lordships qualify their observations by indicating that the English law is not to be imported wholesale into India, regardless of the conditions of the people and the country.

Fortunately, upon the exact question now before me, the case-law of British India is decisive, and is the same as the rule of the English law of torts.

The principle authorities of the English law, in their application to Indian cases, were well considered by Westropp, C. J., in *Satku* v. *Ibrahim Aga* (2), and it was there laid down that the plaintiffs could not maintain a civil suit in respect of an obstruction in a public thoroughfare, unless they could prove some particular damage to themselves personally in addition to the general inconvenience occasioned to the public. The rule so laid down followed many Indian cases upon which the learned Chief Justice relied, and although in that case the obstruction complained of was not of such a permanent character as a building, I hold that the same principle, so far as it requires proof of particular or special damage, is applicable to this case: and in this view I am supported by the ruling of this Court in *Karim Baksh* v. *Budha* (3), where the obstruction complained of consisted of the erection of a *chabutra* which encroached upon a public thoroughfare, and the relief prayed for was the removal of a portion of the *chabutra*, the plaintiffs alleging that the encroachment was such that carts and other wheeled conveyances were unable to pass along the road.

Such being the state of the case-law, I do not think the exigencies of this case either require me to enter into the juristic reasons

(1) L. R., 14, Ind., Ap. 96. (2) I. L. R., 2, Bom., 457.
(3) I. L. R., 1, All., 240.

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upon which this rule is supposed to proceed, or in the face of the authorities of Indian cases, to open up the question how far those reasons are adapted to the conditions of British India. I accept the authority of the case-law as it stands, and hold that no action of this kind is maintainable upon the ground that the defendant has erected obstructions in a public thoroughfare, thereby causing inconvenience to the plaintiff with the rest of the public, there being no allegation or proof of special or particular injury or damage having been sustained by the plaintiff in consequence of such obstructions.

As to the second aspect of the case, namely, so far as it can be regarded as an action for trespass, the contention of the parties raises two main questions:—

First, whether the plaintiff, as the lessee under the lease of the 24th January, 1885, is entitled to maintain the action for removal of constructions made upon the land antecedent to the lease and existing at the time when the plaintiff took the lease. *Secondly*, whether under the terms of the lease itself the plaintiff is entitled to maintain this action without joining his lessor, the Mahárája of Dumraon, and other co-sharers of the village as plaintiffs to the action.

Upon the first of these points, Mr. *Spankie*, in arguing the case on behalf of the plaintiff-respondent, has contended that the circumstance that the erections now complained of were constructed antecedent to the plaintiff's lease does not deprive him of the remedy prayed for by him, because, as the learned counsel argues, the trespass complained of in this case is of a continuing nature, and as such the continuance of the buildings on the land subsequent to the lease would amount to a sufficient cause of action available to the plaintiff for this suit. In support of this contention the learned counsel relies upon *Holmes* v. *Wilson* (1) and *Bowyer* v. *Cook* (2) the effect of which, as represented in Addison's work on Torts (5th ed., p. 50 and pp. 331-2), seems to be that in the case of continuing trespasses, such as trespass by erecting buildings, as a continuing injury, fresh causes of action arise for recovery of damages, and the author exemplifies this by saying that "if a man throws a heap of stones or builds a wall, or plants posts or

(1) 10, Ad. & E., 503. (2) 4, C. B., 236.

rails on his neighbour's land and there leaves them, an action will lie against him for the trespass and the right to sue will continue from day to day till the incumbrance is removed" (p. 331). This no doubt is a correct enunciation of the English law upon the subject; though speaking for myself as an Indian Judge, I can scarcely regard the rule either as reasonable in itself or fit to be applied to cases in India, because the rule renders multiplicity of actions unavoidable, as pointed out by Mr. Mayne in his work on Damages (3rd ed., p. 89), and I agree with him in the view that "the fair rule in such a case would be to give the plaintiff such damages as would compensate him for the loss sustained up to the time of verdict and would pay him for putting the land into its original state."

I need not, however, consider this rule in this case, for here there is no claim for damages in consequence of the alleged continuing trespass. The form of the action, so far as it can be gathered from the plaint, no doubt alleges a trespass, and the substantial relief prayed for asks for an injunction to compel the plaintiff to demolish the erections which he has constructed, and to prohibit him from any future encroachment upon the land. The continuance of such erections may entitle the plaintiff to maintain a suit such as this for their removal, although such constructions were made antecedent to the lease. The right of the plaintiff, however, must be defined and circumscribed by the terms of the lease itself, which fail to show either that the land upon which the defendant has built is included in the lease, or that that document intended to confer upon the plaintiff any power to question the legality of erections which existed at the time of the lease, and for aught that appears to the contrary, the lease itself was given subject to the occupation of the land by existing buildings. Further, the case is bare of proof of the plaintiff's lessor, the Mahárája of Dumraon, ever being in occupation of the land or any specific portion thereof on which the erections have been constructed, and it follows *á fortiori* that the plaintiff himself, whose rights originated with the *thika* lease of the 24th January, 1885, could not have been in occupation of the land when the wrongful entry thereon, by the constructions of the 6th June, 1883, is alleged to have taken place. There is thus no proof of the plaintiff's possession being disturbed,

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and so far as the nature of the action may be regarded as one of trespass *quare clausum fregit* as understood in the English law of torts, the suit cannot be sustained. Under the circumstances, the fact that the plaintiff's lessor, the Mahárája of Dumraon, and the other co-sharers of the zemindari rights of the village have not joined the action, ceases to be a matter of significance for the decision of this case, especially as there is nothing in the form of the action or the allegations contained in the plaint to justify the suit being regarded as one of ejectment.

For these reasons, I am of opinion that the suit even in its second aspect fails, and that it was rightly dismissed by the first Court, though some of the reasons given for such dismissal may be unsound.

I would decree this appeal, and setting aside the decree of the lower appellate Court, restore that of the Court of first instance with costs in all the Courts.

STRAIGHT, J.—I concur in the judgment and conclusions of my brother Mahmood.

Appeal decreed.

1888
May 29,

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

RAM CHAND (JUDGMENT-DEBTOR) *v.* PITAM MAL AND ANOTHER (DECREE HOLDERS).*

Attachment before Judgment—Termination of attachment—Execution of decree—sale in execution—Material irregularity in publishing or conducting sale without attachment—Civil Procedure Code, ss. 311, 488.

The plaintiff instituted a suit against defendant for recovery of money, and previous to judgment, that is, on the 8th of January, 1885, applied for, and on the 11th obtained, order for attachment of several houses and premises belonging to defendant and such attachment was made. The suit was dismissed, but eventually on appeal it was decreed: but the attachment was never withdrawn. Plaintiff then applied for execution of his decree and his application was granted by an order directing that the property of the judgment-debtor should be notified for sale on the 1st February, 1887, and accordingly on the 21st December, 1886, a sale notification was issued. Judgment-debtor twice applied for postponement of sale, but his applications were refused, and the sale took place on the date fixed. Judgment-debtor then objected to the confirmation of the sale urging that the property sold was never attached in execution of the decree and the attachment previous to judgment was infructuous because afterwards the claim was dismissed by the Court of first instance; that there had been several other irregularities

* First Appeal No. 131 of 1887, from an order of Maulvi Saiyid Farid-ud-din Ahmad, Subordinate Judge of Agra, dated the 10th September, 1887.

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in publishing and conducting the sale; and that owing to the irregularities, property had been sold at a grossly inadequate price causing substantial injury. The Subordinate Judge overruling the objections confirmed the sale. On appeal by the judgment-debtor, *held*, following *Mahadeo Dubey* v. *Bholanath Dichit* (1), that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money; and where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void, and may be set aside without any inquiry as to substantial injury being sustained by the judgment-debtor for want of a valid attachment, and that an attachment before judgment, like a temporary injunction, becomes *functus officio* as soon as the suit terminates. Further, that the phrase "a material irregularity in publishing or conducting" in the first paragraph of s. 311 of the Code of Civil Procedure should be liberally construed, and that absence of attachment of property at the time of sale thereof is "a material irregularity," attachment being the first step which a Court in executing a simple money decree has to take to assert its authority to bring property to compulsory sale.

The following cases were referred to in the course of argument.

Mahadeo Dubey v. *Bhola Nath Dichit* (1), *Chunni Kuar* v. *Dwarka Prasad*, (2), *Mohee-ooddeen* v. *Ahmed Hossain* (3), *Gangathara Pandita* v. *Rathaboi Ammal* (4), *Imamuniesa Bibi* v. *Leakat Hossain* (5), *Rameshwari Dassee* v. *Doorgadas Chatterjee* (6), *Bakhshi Nandkishore* v. *Malikchund* (7); *Jasoda* v. *Mathura Das* (8), *Girdhari Sing* v. *Hardeo Narain Sing* (9), *Macnaghten* v. *Mahabir Parshad Sing* (10).

The facts of this case are fully stated in the judgment of the Court.

Mr. *Colvin* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Hon'ble Pandit *Ajudhia Nath*, for the respondents.

MAHMOOD, J.—The facts of this case are the following:—On the 18th June, 1884, a suit was instituted by the present respondent, Pitam Mal, against the appellant, Ram Chand, for recovery of money, and during the pendency of that suit, on the 8th January, 1885, the aforesaid respondent applied, apparently within the meaning of s. 483 of the Code of Civil Procedure, for attachment of property belonging to the defendant. The application was granted on the same day, and attachment before judgment appears to have been made on the 11th January, 1885. It is not clear whether the requirements of s. 484 or s. 485 of the Code were duly observed. The suit, however, was dismissed by the first Court

(1) I. L. R., 5, All., 86.
(2) Weekly Notes, 1887, p. 207.
(3) 14, W. R., 384.
(4) I. L. R., 6, Mad., 237.
(5) I. L. R., 3, All., 424.
(6) I. L. R., 6, Cal., 103.
(7) I. L. R., 7, All., 289.
(8) I. L. R., 9, All., 511.
(9) L. R., 3 I. A., 230.
(10) I. L. R., 9, Cal., 656.

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on the 30th March, 1885 ; but there seems to have been no specific order made by that Court withdrawing the attachment.

The decree of the 30th March, 1885, was however appealed to this Court, and the appeal resulted in decretal of the plaintiff Pitam Mal's suit on the 2nd February, 1886.

It was in execution of this last decree that this litigation was commenced by an application of the decree-holder, Pitam Mal, to execute the decree. The application was made on the 13th November, 1886, and on the 18th December, 1886, the application was granted by an order which directed that the property of the judgment-debtor should be notified for sale on the 1st February, 1887. Accordingly, on the 21st December, 1886, a sale notification was issued ; and the judgment-debtor, Ram Chand, by two applications, one made on the 25th January, 1887, and the other on the 31st January, 1887, prayed for postponement of the sale, apparently under the provisions of s. 305 of the Code of Civil Procedure. Both these applications were, however, disallowed, and the sale of the judgment-debtor's property took place on the 1st February, 1887, at which sale the properties were purchased as follows :—

1. One kothi with shops in Mathra, purchased by Pitam Mal, decree-holder, for Rs. 3,350.
2. One kutcha shop in Mathra, purchased by Pitam Mal, decree-holder, for Rs. 110.
3. One pucka and stone-built stable in Mathra, purchased by Panna Lal, for Rs. 110.
4. One-fourth of a pucka and stone-built building in Mathra, purchased by Pitam Mal, for Rs. 135.

It will appear from the above specification that, with the exception of property No. 3, all the other properties were purchased by Pitam Mal (decree-holder) himself, and the connection of Panna Lal with this litigation seems to be due entirely to his purchase of the property No. 3 abovementioned.

On the 24th February, 1887, the judgment-debtor, Ram Chand, appellant, preferred objections to the auction-sale of the 1st February, 1887, upon various grounds mentioned in the judgment of the

Court below, and that application was resisted by Pitam Mal, the decree-holder, upon pleas which are also stated in the judgment of the lower Court, and need not be repeated here.

The judgment-debtor Ram Chand's objections appear to have been made with the object of setting aside the auction-sale of 1st February, 1887, upon grounds contemplated by s. 311 of the Civil Procedure Code; but those objections have been disallowed by the lower Court, which has held that the attachment before judgment was a sufficient attachment, because although the suit, during the pendency whereof the attachment was made ended in dismissal, the attachment itself had never been withdrawn; that the sale-notification having been affixed to the door of the Court-house, it was not shown that the sale had taken place within thirty days of the issue of the sale-notification; that a proclamation by beat of drum was duly made and the "notifications were duly issued and affixed at the locality of the property;" that "the law does not require any proclamation to be made by beat of drum at the time of sale; and that there was actually made a proclamation at time of the sale of the property in suit such as is generally made at such times by amíns conducting sales;" that when a time for sale is specified in a notification, "it is not thereby intended that the sale must begin exactly at the same time and on the same day as mentioned in the notification." Finally, the lower Court has held that "no irregularity having been made in the issue of notification and conducting the sale, no finding need be made as to the point whether or not the property in suit has been sold for an inadequate price;" but to this view of the law the learned Subordinate Judge adds the following observation:—"However, as regards the question of the inadequacy of price, I hold that the alleged rate is not proved by any oral or documentary, reliable or trustworthy evidence." The effect of the learned Subordinate Judge's judgment is to confirm the sale of the 1st February, 1887, and the order must be understood to have been passed under s. 312 of the Code of Civil Procedure, disallowing the objections raised by the judgment-debtor, Ram Chand, appellant. It has been argued by the learned Pandit, on behalf of the respondent, that the order of the lower Court, so far as it disallowed objections to the sale, is not appealable within the meaning

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of cl. (16) of s. 588 of the Code of Civil Procedure; but this contention is opposed to the Full Bench ruling of this Court in *Tota Ram* v. *Khub Chand* (1), where I stated my reasons for holding that such orders are appealable. To the reasons I then stated I have nothing to add, beyond saying that in this case the order of the lower Court disallowing the objections of the judgment-debtor to the auction-sale of the 1st February, 1887, and confirming that sale is one and the same order, and, as such, appealable under cl. (16) of s. 588 of the Code of Civil Procedure. The rest of the argument addressed to us on behalf of the parties, however, raises the following questions for determination:—

(1) Whether an attachment before judgment, such as the attachment of the 11th January, 1885, was not a good and valid attachment for purposes of the execution of the High Court's decree of the 2nd February, 1886, notwithstanding the dismissal of the suit by the first Court on the 30th March, 1885?

(2) If not, whether the absence of a valid attachment at the time of sale of the 1st February, 1887, can be regarded as "a material irregularity in publishing or conducting" the sale so as to be questioned under s. 311 of the Code?

(3) If so, whether the action of the judgment-debtor in making the applications of the 25th January, 1887, and 31st January, 1887, praying for postponement of the sale, amounts to a waiver on his part of any irregularities so as to preclude him from contesting the sale upon the ground that there was no valid attachment?

(4) If so, whether such irregularity would in itself be sufficient to vitiate the sale without proof of "substantial injury" within the meaning of that section?

(5) Whether in this case any such "substantial injury" is proved as is contemplated by s. 311 of the Code?

As to the first of these questions, it is necessary to premise that we cannot go behind the Full Bench judgment of this Court in *Mahadeo Dubey* v. *Bhola Nath Dichit* (2), where the whole Court unanimously adopted the view of my brother STRAIGHT that a regularly perfected attachment is an essential preliminary

(1) I. L. R., 7, All., 253. (2) I. L. R., 5, All., 86.

to sales in execution of simple decrees for money; and where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void.

This being so, we have been referred by the learned Pandit to the provisions of ss. 483, 485, 488, and 490 of the Code of Civil Procedure; and also to the form No. 163 in schedule IV. of the Code relating to attachment before judgment of immoveable property, in which form the words "*until the further order of this Court*" occur; and relying upon these provisions, the learned pleader argues that inasmuch as in the present case no further order withdrawing the order of attachment before judgment was passed the attachment must be taken to have subsisted for all purposes of execution, including the sale of the 1st February, 1887. On the other hand, Mr. *Colvin* relies upon the last part of s. 488 to show that an attachment before judgment comes to an end "when the suit is dismissed;" and the learned counsel also lays stress upon the provisions of s. 490, and argues that the words of that section contemplate that it is only when a decree is given *in favour* of the plaintiff that re-attachment in execution of such decree is dispensed with, implying that such attachment is necessary where the suit ended in dismissal of the plaintiff's claim. For this contention the learned counsel also relies upon the ruling of the learned Chief Justice in *Chunni Kuar* v. *Dwarka Prasad* (1) where it was held that a temporary injunction under s. 492, notwithstanding the use of the phrase "till further orders," comes to an end on the termination of the suit in which such injunction was passed, although no express order had been made by the Court withdrawing or setting aside such injunction.

I am of opinion that this contention is sound, and that the case last cited, though relating to temporary injunction, proceeds upon a principle analogous to attachments before judgment, both being *ad interim* proceedings which naturally cease to have any force as soon as the suit itself, in respect of which they were taken, comes to a close. In other words, an attachment before judgment under s. 488, like a temporary injunction under s. 492, becomes *functus officio* as soon as the suit terminates. It is true, as was argued by the learned Pandit, that s. 492 does not expressly mention an

(1) Weekly Notes, 1887, p. 297.

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order by the Court removing or setting aside the injunction, and in this respect the language of s. 488, as to the removal of attachment before judgment, is more express; but I do not think that this circumstance alters the principle applicable to *ad interim* proceedings, nor do I think that the last part of s. 488 requiring the Court to remove the attachment is intended to be more than directory, or in other words so imperative as to render an attachment before judgment a perpetual attachment in the absence of an order removing the same. For this view I rely upon the reasoning employed by the learned Chief Justice in connection with temporary injunctions in the case which I have already cited. If attachments before judgment, such as those contemplated by s. 485, were intended to continue operative notwithstanding the dismissal of the suit, I should say that s. 490 of the Code would have been a surplusage, for that section implies that, even where a suit is decreed, an attachment before judgment would come to an end with the decision of the suit but for the provision which that section has made. This view is in accord with the judgment of Sir Louis Jackson in *Mohee-ood-deen* v. *Ahmed Hossein* (1), and I hold that that ruling, though passed under the Code of 1859, is applicable in principle to this case. Pandit *Ajudhia Nath*, on behalf of the respondent, has indeed argued that the phrase "*any decree which may be passed in the suit*," as it occurs in s. 485 of the Code, must be understood to mean that an attachment before judgment is to remain operative for the satisfaction of "any decree" which may be passed in any appeal made from any decree in such suit; and upon this ground the learned pleader contends that the High Court's decree of the 2nd February, 1886, was a decree in the "suit." I cannot accept this contention, because it would render s. 485 inconsistent with the last part of s. 488, which directs the Court passing the order of attachment before judgment to remove such attachment "*when the suit is dismissed.*" It could scarcely be contended that during the interval between the dismissal of the suit on the 30th March, 1885, and the filing of the appeal to this Court which resulted in the decretal of the claim on the 2nd February, 1886, there was any litigation pending in any Court; and if I were to hold that the attachment of the 11th January, 1885, sub-

(1) 14, W. R., 284.

sisted during that interval, I should be laying down the untenable rule that an *ad interim* order survives the pendency of the main litigation itself; and indeed if I were to hold this, I should be driven to the logical conclusion that such *interim* order of attachment subsists for ever whether there is or is not an appeal, unless and until such order is expressly withdrawn. I hold therefore that inasmuch as the suit in which the attachment of the 11th January, 1885, was made terminated in dismissal on the 30th March, 1885, that attachment ceased to be operative after that date, and that, since no further proceedings are alleged to have been taken to attach the property in execution of the High Court's decree of the 2nd February, 1886, there was no valid attachment subsisting on the 1st February, 1887, when the judgment-debtor's properties were sold by auction.

Upon the second question above enunciated by me, the learned Pandit has argued that absence of a valid attachment at the time of sale is not such "a material irregularity in *publishing* or *conducting*" the sale as s. 311 of the Code contemplates; and that even accepting the Full Bench ruling in *Mahadeo Dubey* v. *Bhola Nath Dichit* (1), such questions cannot be agitated by the judgment-debtor after the sale has actually taken place. For this contention the learned pleader relies on *Gangathára Panditha* v. *Rathabai Ammal* (2), where it was held that after a sale of land in execution of a decree and before its confirmation the judgment-debtor cannot object to the validity of the sale on the ground that the execution of the decree is barred by the provisions of s. 230 of the Code of Civil Procedure. On the other hand, Mr. *Colvin*, in resisting this contention, relies on *Imamunissa Bibi* v. *Liakat Husain* (3), and *Ramessuri Dassee* v. *Doorga Dass Chatterjee* (4), the effect of which cases is to lay down the rule that an omission to give the notice required by s. 248 of the Code to the judgment-debtor affects the regularity of the sale, and might be dealt with as a matter falling within the purview of s. 311 of the Code of Civil Procedure. The learned counsel further relies on *Bakhshi Nand Kishore* v. *Malak Chand* (5), where Oldfield J., with my concurrence, held that an infringement of the rule contained

(1) I. L. R., 5, All., 86.
(2) I. L. R., 6, Mad., 237.
(3) I. L. R., 3, All., 424.
(4) I. L. R., 6, Calc., 103.
(5) I. L. R., 7, All., 289.

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in s 290 of the Civil Procedure Code, is an irregularity vitiating a sale in execution of decree, and is something more than a material irregularity in publishing a sale to which s. 311 refers. Again, the learned counsel cites *Jasoda* v. *Mathura Das* (1), to which the learned Chief Justice and myself were parties, and we held that non-compliance with the provisions of ss. 287 and 290, which sections provide for the contents of the proclamation of sale and the period at which such sale should be held after the proclamation, is more than mere irregularity, and that it must be taken to have caused such substantial injury as would vitiate the sale within the meaning of s. 311 of the Code of Civil Procedure. In delivering my judgment in that case, I gave expression to a doubt as to whether "a material irregularity" within the meaning of the first paragraph of s. 311 would not in itself be sufficient to justify a Court in setting aside a sale without inquiring whether such irregularity had resulted in "substantial injury" within the meaning of the second paragraph. The view so expressed is contested by the learned Pandit on behalf of the respondent, and I shall presently consider it in deciding the third point in the case. But so far as the second point is concerned, I am of opinion that the authorities cited by Mr. *Colvin*, and already referred to by me, justify me in holding that a broad and liberal construction must be placed upon the phrase "a material irregularity in publishing or conducting" a sale as that phrase is employed in the first paragraph of s. 311 of the Code. The words "publishing or conducting" are words of a very general import, and unless there is anything in the Code to restrict their ordinary meaning, the recognised rules of interpreting statutes require that such interpretation should be in the ordinary sense of the words. It is probably not easy to define exhaustively what matters would fall under the category of material irregularity in publishing or conducting a sale; but the point here is limited to the question whether absence of attachment at the time of the sale is any such material irregularity.

I must answer the question in the affirmative, consistently with the principle upon which the Full Bench ruling of this Court in *Mahadeo Dubey* v. *Bhala Nath Dichit* (2) and the other cases cited by Mr. *Colvin* proceed. It seems to me that there is a distinction

(1) I. L. R., 9 All., 511. (2) I. L. R., 5, All. 86.

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between matters which relate to the capability of a decree for execution and matters which do not relate to such capability, but to the mode in which the decree is to be executed and satisfied. The Code of Civil Procedure has, indeed, placed both these classes in Chapter XIX under the general heading of rules relating to the execution of decrees. But that chapter is sub-divided into various headings mentioned in my brother Straight's judgment in the Full Bench case just referred to. Heading D, which consists of only one section (244), describes questions to be decided by the Court executing the decree, and it seems to me that even the general terms of clause (c) of that section cannot be understood to include such matters as are contemplated by s. 311 of the Code, because when a sale has taken place, auction-purchasers, who, as such, are no parties to the decree, become interested in such questions, and become necessary parties to applications for setting aside sales. The provisions of s. 244 being thus unavailable to the judgment-debtor in cases where a sale has actually taken place without any attachment, it can only be under s. 311 of the Code that he has his remedy for setting aside the sale, upon the ground that absence of attachment was "a material irregularity" within the meaning of that section. Nor do I think that it is extending the meaning of the phrase too far.

The general principle of law is that the only person who can sell property is the owner, and it is only by reason of statutory provisions arising from the exigencies of the administration of justice that the Courts possess authority to order compulsory sales, such as auction-sales in execution of decrees. But in conferring this power, the law has provided specific rules of procedure in order to guard against injustice. Among those safeguards attachment is perhaps the most important preliminary to bringing property to auction-sale. It is the first step which the Court in executing simple money-decrees has to take to assert its authority to bring property to compulsory sale, and I do not see why the omission to take such a step should not be regarded as a material irregularity within the meaning of s. 311 of the Code. Objections based upon the absence of attachment are not objections which attack the capability of a decree for execution,

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as was the case in *Gangathara Panditha* v. *Rathabai Ammal* (1), where the objection upon which sale was sought to be set aside was that the decree itself was barred by limitation. The nature of such an objection is of course such as would fall under s. 244 of the Code; and the learned Judges in that case accordingly held that the objection was too late when made after the sale had actually taken place, and the proper occasion for such objection was before the sale took place. Now, in cases where no attachment has taken place, and property is proclaimed for sale under s. 287 of the Code, it could scarcely be expected that the judgment-debtor would take proceedings to secure a valid attachment of the interests of the opposite party, namely, the decree-holder. And if this is so, it seems that the only opportunity which the judgment-debtor could have for proffering any objections as to the absence of a valid attachment would be after the sale has actually taken place.

The learned Pandit has, however, in arguing the third point, contended that in this case the action of the judgment-debtor in making the applications of 25th January, 1887, and 31st January, 1887, praying for postponement of the sale, amounted to waiver on his part of any such irregularity as would arise from the absence of attachment; and for this contention the ruling of the Privy Council in *Girdhari Singh* v. *Hardeo Narain Singh* (2) and *Macnaghten* v. *Mahabir Pershad Singh* (3) are cited. In the former of these cases the judgment-debtor obtained a postponement of sale upon an express stipulation of "the attachment and notification of sale being maintained," and the order of postponment having been made in those terms, the Lords of the Privy Council held that the judgment-debtor could not after the sale complain of any irregularity in such notification. The case, however, is distinguishable from the present, because here no such express specification, as to the validity of the notification, or its being allowed to be maintained, was made; and in the next place, neither of the applications for postponement of sale was granted. In the latter case, all that the Lords of the Privy Council ruled was that an objection as to any particular irregularity could not be taken for the first time in the Court of appeal. Such however is not the case here, for the objec-

(1) I. L. R., 6, Mad., 237. (2) L. R., 3, Ind., Ap. 230.
(3) I. L. R., 9, Calc., 656.

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tion was taken in the Court of first instance. I am therefore of opinion that neither of these Privy Council rulings governs this case so as to preclude the judgment-debtor from contesting the validity of the auction-sale.

Dealing now with the fourth question in the case, I have already said that in delivering my judgment in *Jasoda* v. *Mathura Das* (1), I was inclined to hold that a "material" irregularity, as distinguished from a simple irregularity, would vitiate a sale without proof of "substantial injury" within the meaning of the second paragraph of s. 311. of the Code. The learned Pandit has argued that this view is opposed to the *dicta* of the Lords of the Privy Council in *Girdhari Singh* v. *Hardeo Narain Singh* (2) and in *Macnaghten* v. *Mahabir Pershad Singh* (3), and I confess that there may be much force in this contention. But it is not necessary in this case to go further into the matter, because, as I have already shown, the effect of the Full Bench ruling in *Mahadeo Dubey* v. *Bhola Nath Dichit* (4) requires that in this case the sale of the 1st February, 1887, must be held to be void for want of a valid attachment.

This view renders the decision of the fifth point in the case unnecessary, because the absence of attachment is in itself sufficient to set aside the sale without any inquiry as to substantial injury being sustained by the judgment-debtor. For these reasons I would decree this appeal, and, reversing the order of the lower appellate Court, set aside the auction-sale of the 1st February, 1887, with costs in both Courts.

BRODHURST, J.—I concur.

Appeal decreed.

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June 23.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

SALONI AND ANOTHER (DEFENDANTS) v. HAR LAL (PLAINTIFF).*

Act XVII of 1886, s. 8—Decree made in British India—Suit on Judgment in Native territory—Cession of territory to British Government pending suit—Civil Procedure Code, s. 13.

Prior to the cession of the town of Jhánsi to the British Government plaintiff had instituted a suit in the Subah's Court in the Gwalior State on a judgment

* First Appeal No. 72 of 1888, from an order of E. Ward, Esq., Commissioner of Jhánsi, dated the 30th August, 1887.

(1) L. R., 3 I. A., 230. (3) I. L. R., 9, All., 511.
(2) I. L. R., 2, Calc. 556. (4) I. L. R., 5, All., 86.

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of the British Court in Jhánsi district. After the cession, the suit was made over for trial to the Court of the Assistant Commissioner of the Jhánsi district. The suit was dismissed by the first Court as barred by s. 13 of the Code of Civil Procedure, but remanded by the lower appellate Court for trial on the merits.

Held, that the recital in part II of Act XVII of 1886 shows that it was intended that suits pending in the Courts of the Gwalior State prior to the cession of the town of Jhánsi to the British Government should be continued in the courts of the Jhánsi district after the cession thereof; therefore the present suit, which if it had been originally instituted in a court of British India, could not have been maintained, being an action on a judgment of a court of British India, was a good and maintainable action in the Court where it was instituted, and is to be deemed to be a properly instituted suit to which in other respects the law of the Courts of British India may now be applied.

King v. *Hoare* (1), referred to as illustrating the distinction between an original cause of action and cause of action founded upon a judgment recovered on the original cause of action.

Prior to the cession of the town and fort of Jhánsi to the British Government in full sovereignty by His Highness the Mahárája Scindia, the father of the plaintiff had obtained a decree for Rs. 2,959-12-6 with costs against the father of the defendant from the Court of the Assistant Commissioner of Jhánsi presided over by Mr. McLean. After partial satisfaction of the decree within the Jhánsi district, the plaintiff on the 11th of December, 1885, brought his suit for the unpaid balance of the decree in the Subah's Court in the Gwalior State, and the suit was pending in that Court when by Act XVII of 1886 the town of Jhánsi came under the jurisdiction of the Courts in the Jhánsi district.

On the 1st of February, 1887, the suit was made over by the Deputy Commissioner of Jhánsi to the Court of the Assistant Commissioner of Jhánsi and that officer dismissed the suit; remarking "the suit having already been decided by Mr. McLean, is evidently barred by s. 13, Act XIV of 1882."

On appeal to the Commissioner of Jhánsi, that officer holding that the cause of action in the suit decided by Mr. McLean was not the same as that which led to the present suit, reversed the order of the lower Court, and remanded the cause for trial on the merits.

On appeal against this order of remand it was again contended that s. 13 of the Code of Civil Procedure barred the suit.

(1) 13, M. & W, 504, S. C. 14 L. J. Ex. 20.

Messrs. *Khushwakt Rai* and *Malcolmson*, for the appellants.

Mr. *Amir ud-din*, for the respondent.

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EDGE, C. J., and TYRRELL, J.—Prior to the cession of the town of Jhánsi and the lands ceded therewith to the British Government, the plaintiff had obtained a judgment in the Assistant Commissioner's Court of Jhánsi, that is, in one of the Courts in British India. That decree was for 3,000 odd rupees. After obtaining that decree and before the cession of the territory, he brought his action against the same defendants in the territory of Gwalior on the decree obtained in British India. *Primâ facie* that was a perfectly good action. Whilst the suit in Gwalior was pending and undetermined, the territory, in which was the Gwalior Court before which that suit was pending, was ceded to the British Government. The question is whether the action which was pending in Gwalior can, under s. 8 of the Act XVII of 1886, be continued in what is now part of British India. The first Court thought that s. 13 of the Code of Civil Procedure applied. The Commissioner of Jhánsi, sitting as a Court of appeal, correctly held that s. 13 did not apply. The cause of action was not the same. The action which is now pending in the Court was, so far as the Court in Gwalior was concerned, brought on the then foreign judgment or decree, and that action was the only course which was left open to the plaintiff to enforce in Gwalior the judgment which he had obtained in British India. The recital in Part II of the Act shows that it was intended that suits which were pending in the Courts of His Highness the Mahárája Scindia should be continued in the Courts of the Jhánsi district. The only difficulty we have had was to ascertain what was the meaning of the words in s. 8, "but otherwise in accordance with the law and procedure of British Indian Courts." Although this action, if it had been originally brought in a Court in British India, could not have been maintained, being an action on a judgment of a Court in British India, still it was a good and maintainable action in the Court in which it was instituted and was pending at the time of the cession of the territory. We think it must be deemed to be a properly instituted suit to which in other respects the law of the Courts of British India may now be applied.

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The distinction which the Commissioner of Jhánsi has very properly drawn between the original cause of action in and the cause of action in this suit, is illustrated in the judgment in *King* v. *Hoare* (1).

The appeal is dismissed with costs.

Appeal dismissed.

1888 *May* 4.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

GAJADHAR AND OTHERS (DEFENDANTS) v. MUL CHAND AND OTHERS (PLAINTIFFS).*

Mortgage—Sale of equity of redemption—Suit by mortgagee for sale of mortgaged property—Purchaser not a party to suit—Sale of mortgaged property in execution of decree obtained by mortgagee—What passed—Right of purchaser of equity of redemption—Redemption.

On the 21st December, 1871, three of the defendants in this suit mortgaged four groves to *H*. In 1872 the plaintiffs obtained a money-decree against one *D*, and in August, 1872, in execution of that decree, sold the said groves and at the sale purchased them and also two mills which were not in dispute in this suit. The decree against *D* has been found to have the same effect as if it were had and obtained against all the mortgagors. Of this sale *H* had notice, in fact he opposed it. Subsequently *H*, the mortgagee, sued the mortgagors on their mortgage, and obtained a decree on it, and under the decree brought the said groves to sale in 1877, and purchased them himself. In May, 1880, *H* sold the groves to two of the defendants. The plaintiffs, who were not parties to the suit which resulted in the decree under which the groves were sold in 1877, instituted this suit for possession of the groves.

Held, that notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title and interest of the mortgagors, as they existed at the date of the mortgage of 21st December, 1871, with which would go the rights and interests of the mortgagee, and although at a sale under a decree for sale by a mortgagee the right, title and interest of the mortgagor which is sold is his right, title and interest at the date of the mortgage, and any right, title and interest he may have acquired between the date of the mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of the mortgagee's decree and who was not a party to the suit in which the mortgagee obtained his decree, would have the right to redeem the property which the mortgagor would have had but for the decree. This view is consistent with the principles of equity and recognised by the Transfer of Property Act.

* Second Appeal, No. 1681, of 1886, from a decree of J. Deas, Esqr., District Judge of Jaunpur, dated the 23rd of June, 1886, confirming a decree of Muhammad Nasarullah Khan, Subordinate Judge of Jaunpur, dated the 1st December, 1884.

(1) 13 M. & W. 504. S.C. 14 L.J. Ex. 29.

Muhammad Sami-ud-din, v. *Man Sing* (1) followed.

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The following cases were referred to and considered in the judgment :—

GAJADHAR v. MUL CHAND

Abdulla Sziba v. *Abdulla* (2), *Mohan Mmor* v. *Tegu Uka* (3), *Khub Chand* v. *Kalian Das* (4), *Ali Hasan* v. *Phirja* (5), *Sita Ram* v. *Amir Begam* (6), *Bhup Singh* v. *Gulab Rai* (7), *Ramanath Das* v. *Boloram Phookun* (8), *Naran Purshotam* v. *Dolatram Virchund* (9).

THIS was a suit for possession of certain groves and two sugar mills.

The plaintiffs in the suit had in the year 1872 obtained a decree for rent against one Durga, and in August, 1872, in execution of that decree, caused the groves and mills to be sold, and at the sale purchased them themselves. Prior to this, that is, on the 21st of December, 1871, the defendants, Durga Dubey and his brothers Rameshar, Jageshar and Purmeshar, had mortgaged the four groves to one Maulvi Hyder Husain. Maulvi Hyder Husain had notice of the sale to plaintiffs, in fact, he opposed the sale. He then brought a suit against the mortgagors and obtained a decree on his mortgage, and under that decree brought the groves to sale in July, 1877, and purchased them himself. The plaintiffs were not made parties to this action, nor does it appear that they ever had objected to the sale by Maulvi Hyder Husain. In the month of May, 1880, Maulvi Hyder Husain sold the groves to the defendants Purmeshar Dubey and Sundar Dubey, and in May, 1882, they were recorded by the Settlement Officer as the owners of the groves and the objections of the plaintiffs to this record being made, were disallowed.

The plaintiffs alleged that they were dispossessed of the groves by the defendants in the year 1882 and brought this suit.

The defendants in their answer contended, amongst other contentions, that as Maulvi Hyder Husain had purchased the groves at a sale under a decree enforcing a lien upon the groves which had existed prior to the plaintiffs' purchase in 1872, their title derived from Maulvi Hyder Husain ought to prevail over that of the plaintiffs'.

(1) I. L. R., 9 All., 125.
(2) I. L. R., 5 Bom., 8.
(3) I. L. R., 10 Bom., 224.
(4) I. L. R., 1 All., 240.
(5) I. L. R., 4 All., 518.
(6) I. L. R., 8 All., 324.
(7) Weekly Notes, 1886, p. 70.
(8) I. L. R., 7 Calc., 677.
(9) I. L. R., 5 Bom., 580.

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The learned Subordinate Judge of Jaunpur decided that the title of the plaintiffs was superior to that of the defendants, and decreed possession of the groves with a certain amount of damages in favor of the plaintiffs.

In appeal to the learned Judge of the district, the defendants again contended that what was sold in the year 1872, at the instance of the plaintiffs, was subject to the lien upon the groves created in favor of Maulvi Hyder Husain in December, 1871, and therefore they, as representatives of Hyder Husain, had the better and superior title. The learned Judge held that inasmuch as the plaintiffs, who were owners of the groves at the time when Maulvi Hyder Husain brought his suit on his mortgage, were not made parties to the suit, the decree obtained by him did not bind them, and further as the property sold in 1877 did not then belong to the judgment-debtors of Maulvi Hyder Husain, he acquired no title to the groves by their sale at auction in his favor, and consequently the defendants acquired no title to the groves in suit by their purchase from Maulvi Hyder Husain. The appeal was accordingly dismissed.

In second appeal the defendants again urged the above contention.

Mr. G. T. *Spankie*, for the appellants.

Mr. *Amir-ud-din*, for the respondents.

EDGE, C. J.—This is an action for possession. The plaintiffs allege that they were ejected by the defendants. The defendants deny that the plaintiffs were ever in possession. There are no findings on this issue. The questions under appeal have been brought before us on different lines. On the 21st December, 1871, three of the defendants mortgaged the four groves in suit to Maulvi Hyder Husain. In 1872 the plaintiffs obtained a money-decree against Durga, and in August, 1872, in execution of that decree, sold the groves in question, and at the sale purchased them, and also two mills. It has been found below that that decree had the same effect as if it had been against all the mortgagors. Of this sale Maulvi Hyder Husain had notice; in fact, he opposed the sale. At a later period Maulvi Hyder Husain, the mortgagee, sued the mortgagors on the mortgage, and obtained a decree on the

mortgage, and under that decree brought the groves to sale in 1877, and purchased them himself. In May, 1880, Maulvi Hyder Husain sold the groves to two of the defendants. It is quite clear that the plaintiffs are entitled to a decree for possession so far as the two mills are concerned. The title to them has not been disputed before us. What we have to consider is what is the position of the parties with regard to the property which was mortgaged on the 21st December, 1871. The plaintiffs were not made parties to the action which resulted in the decree under which Maulvi Hyder Husain sold the property in 1877.

A great number of cases have been cited to us in the argument in this case.

I think there can be no doubt that notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title and interest of the mortgagors as they existed at the date of the mortgage of the 21st December, 1871, with which would go the rights and interests of the mortgagee. I think this proposition is established by the following authorities:—*Abdulla Saiba* v. *Abdulla* (1) and *Mohan Manor* v. *Togu Uka* (2) The same principle is enunciated by Mr. Justice Turner in the case of *Khub Chand* v. *Kalian Das* (3). That, in my judgment, is subject to this, that although at a sale under a decree for sale by a mortgagee, as in this case, the right, title and interest of the mortgagor which is sold is his right, title and interest at the date of the mortgage, and any right, title, and interest he may have acquired between the date of mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of the mortgagee's decree who was not a party to the action in which the mortgagee's decree was obtained, would have the right to redeem the property which the morgagor would have had had it not been for the decree. I am aware that this view is at variance with the decisions of this Court in the following cases:—*Khub Chand* v. *Kalian Das* (4), *Ali Husain* v. *Dhirja* (5), *Sita Ram* v. *Amir Begam*, (6). With regard to the latter case my brother Mahmood followed the ruling of Mr. Justice Turner in *Khub*

(1) I. L. R., 5 Bom., 8.
(2) I. L. R., 10 Bom., 224.
(3) I. L. R., 1 All., 245.
(4) I. L. R., 1 All., 240.
(5) I. L. R., 4 All., 518.
(6) I. L. R., 8 All., 324.

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Chand v. *Kalian Das* (1). My brother Mahmood expressed his doubts in *Bhup Singh* v. *Gulab Rai* (2) as to the correctness of the rule laid down by Mr. Justice Turner. My view in regard to the conflict of authority when it is considered is that it is safer for us to follow the principle which my brothers Straight and Tyrrell laid down in the case of *Muhamad Sami-ud-din* v. *Man Singh* (3), particularly as that principle has been recognised and acted on by the High Court of Bombay, and is consistent, in my view, with the true principles of equity. It is also the principle which has been recognised in the Transfer of Property Act. Mr. *Amir-ud-din* contended for the respondents that nothing passed at the sale in 1877, and for that proposition he relied on the case of *Ramanath Dass* v. *Boloram Phookun* (4), and the case of *Naran Purshotam* v. *Dolatram Virchand* (5). The case in I. L. R., 7 Calc., 677, apparently assumed that what could be sold was the mortgagor's right at the date of the sale. The case in I. L. R., 6 Bom., 538 does not appear to me to be in support of Mr. *Amir-ud-din's* contention. I am of opinion that this action must fail in so far as it claims possession of the four groves, and that it must succeed so far as the possession of the two mills are claimed. We make a decree that the plaintiffs may redeem if they commence proper proceedings to ascertain the amount within six months. The appellants will succeed as to the four groves and the Rs. 20 damages for the mango trees and will fail as to their claim for the two mills. Under these circumstances I think the appeal should be allowed in part and dismissed in part without costs.

BRODHURST, J.—I concur.

Appeal dismissed.

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May, 7.

Before Mr. Justice Straight and Mr. Justice Mahmood.

JAG LAL (DEFENDANT), *v.* HAR NARAIN SINGH (PLAINTIFF).*

Act XV of 1877 *(Limitation Act), ss.* 5, 15—*Admission of appeal beyond time—"Sufficient cause"—Appeal filed in wrong Court—Bona fide proceedings—Jurisdiction—valuation of suit.*

Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the

* First Appeal No. 207 of 1886, from a decree of Rai Manmohan Lal, Subordinate Judge of Azamgarh, dated the 11th June, 1886.

(1) I. L. R., 1 All., 240.
(2) Weekly Notes, 1886, p. 70.
(3) I. L. R., 9 All., 125.
(4) I. L. R., 7 Calc., 677.
(5) I. L. R., 6 Bom., 538.

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statements contained in the plaint in the cause. The valuation of the claim as preferred by the plaintiff, and not as set up by the plea in defence, would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation.

Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provision of law, is not a sufficient cause within the meaning of s. 5 of the Limitation Act for admitting the same appeal in the proper Court after the period of limitation prescribed therefor had expired.

To enable the Court to admit an appeal after the period of limitation prescribed therefor had expired on the ground that the same had in the first instance been preferred within the period of limitation provided therefor but to a wrong Court, the appellant must satisfy that he made his appeal to the wrong Court "*bonâ fide*," that is, under an honest though mistaken belief, formed with due care and attention, that he was appealing to the right Court.

THIS was a suit for possession of shares in certain revenue-paying mahâls.

The plaintiff in the suit, who owned the said shares, alleged in his plaint that the defendants had fraudulently caused him to execute a sale-deed of the same in their favour for the nominal consideration of Rs. 3,000, and obtained possession thereof. The plaintiff valued his claim and the subject-matter of the suit at Rs. 10,000, and the suit was instituted in the Court of the Subordinate Judge of Azamgarh.

The defendants in their written statement did not contest the valuation of the suit, but resisted it on other grounds.

On the 11th June, 1886, the Subordinate Judge decreed the plaintiff's claim and from that decree Jag Lal, one of the defendants, appealed to the District Judge at Azamgarh, who by his order of the 6th December, 1886, returned the memorandum of appeal filed in his Court to the defendant, finding that the value of the subject-matter of appeal exceeded Rs. 5,000, the pecuniary limits of his appellate jurisdiction.

The defendant Jag Lal then on the 13th December, 1886, presented his appeal to the High Court, where it was admitted by order of a single Judge, subject to any objection that might be raised at the hearing on the ground that the appeal was not presented within the time allowed by law.

At the hearing of the appeal, counsel for the respondent contended, that the appeal had been preferred much beyond the period

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of limitation provided by law, and that no circumstances existed to justify the Court, as a Court of appeal, in admitting it after the period prescribed therefor had expired.

On behalf of the appellant it was urged in reply that under the peculiar circumstances of the case, the provisions of s. 5 of the Limitation Act were available to him and the Court in exercising its discretionary powers might resort to the analogy of the law contained in s. 14 of the Limitation Act. Appellant further urged that as he set up the plea that the value of the property was Rs. 3,000, which he paid as the sale consideration, he was justified in preferring his appeal to the district Court. It was not stated on his behalf that by reason of any mistake of fact he had been led to prefer this appeal in the first instance to the district Court.

The Hon'ble Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

The Hon'ble *T. Conlan*, and Mr. *Simeon*, for the respondent.

MAHMOOD, J.—In this case a preliminary objection has been raised by Mr. *Conlan* on behalf of the plaintiff-respondent, to the effect that this appeal has been preferred to this Court and admitted beyond the period of limitation provided by law, without any such circumstances existing as would justify this Court, as a Court of appeal, in admitting the appeal beyond time, under the provisions of s. 5 of the Limitation Act. The plaint clearly shows that the plaintiff valued his claim and the subject-matter of the suit at a sum of Rs. 10,000, and in the litigation the defence set up by the defendant did not expressly dispute such valuation of the suit, but resisted the suit upon other grounds, which have no strict bearing upon the question of jurisdiction. The Court of first instance decreed the claim, holding that the property belonged to the plaintiff, and that the sale-deed set up by the defendant was fraudulent and fictitious.

This decree was passed on the 11th June, 1886, and from that decree the defendant preferred an appeal to the District Judge of Azamgarh, who by his order of the 6th December, 1886, returned the memorandum of appeal, finding that the subject-matter of litigation exceeded the sum of Rs. 5,000, which was the pecuniary

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limit of his appellate jurisdiction. This having occurred, the present appeal was not presented to this Court before the 13th December, 1886, from the decree of the first Court dated the 11th June, 1886.

It is clear, and there is no contention, that this appeal calculated by the ordinary rules of computing the period of limitation is barred, and the only ground upon which Mr. *Kashi Prasad* has asked us to hear this appeal and to dispose of it upon the merits is that under the peculiar circumstances of this case the provisions of s. 5. of the Limitation Act are available to his client, and in exercising the discretionary powers conferred upon us as a Court of appeal we might resort to the analogy of the law contained in s. 14 of the Limitation Act.

This appeal has been already admitted by the order of a single Judge, subject to any objection that may be raised at the hearing of the case, and even if no such qualification had been made, the Full Bench ruling in the case of *Dubey Sahai* v. *Ganeshi Lal* (1) has laid down that the Bench which has to deal with the case finally is entitled to dispose of such questions.

The question then is,—Is this appeal within time, or rather has this appeal been preferred within such time as would entitle the appellant to the benefit of the discretionary power of s. 5 of the Limitation Act? I may say at once that s. 14 of the Limitation Act is not directly applicable to this case, because that section applies only to suits and applications, and has no reference to appeals such as the one now before us; because if it did apply to appeals, then s. 5 of the Limitation Law would, to that extent, amount to a surplusage, an interpretation which I am not willing to place upon the Limitation Act.

It has been contended on behalf of the appellant that the action of the defendant-appellant in preferring the appeal to the Court of the District Judge of Azamgarh was a *bonâ fide* proceeding. Mr. *Kashi Prasad* does not say that such proceeding was the result of any error of fact, and his argument does not suggest that it was an error other than that of law. The learned pleader argued that where a plaintiff values his claim at a particular sum of

(1) I. L. R., 1 All., 34.

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money, and the defendant raises a plea disputing such valuation, reducing it to a sum lower than that named by the plaintiff, an unsuccessful defendant in such a litigation has got a right, in appealing from the decree of the first Court, to go not to the Court which would have jurisdiction with reference to the pecuniary valuation of the suit, but to the Court which with reference to the defence set up by the defendant as to the valuation of the suit would *ordinarily have jurisdiction. And upon this argument the* learned pleader argues that because the defendants in this case had set up a plea that Rs. 3,000 was the value of the property in suit, therefore they were perfectly justified in not preferring their appeal to this Court, but preferring it to the Court of the District Judge of Azamgarh.

I am opinion that this contention is entirely unsound. Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint. A plaintiff may sue for a million pounds as damages either for a tort committed or as the value of certain moveable property which can no longer be recovered. The defendant may, in such an action, plead that the amount of damages claimed is excessive, and the value of the property is also exaggerated, and that in either case all that the plaintiff is entitled to is far less than the million pounds. The question is at which assessment the question of jurisdiction is to be settled? Is it the valuation of the claim as preferred by the plaintiff or the plea set up in defence? I have no hesitation in saying that it is the valuation of the plaint which would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation. In support of this view I need only cite the Full Bench ruling of this Court in *Mahomed Hossein Khan* v. *Shib Dyal* (1) and the views expressed by my brother Straight in *Gobind Singh* v. *Kallu* (2) [see also *Chunder Koomar Mundul* v. *Bakur Ali Khan* (3)].

I hold that the present appellant in going to the Court of the District Judge of Azamgarh in appeal was acting in contravention of the law, which law it was his duty to know. *Ignorantia legis*

(1) N.-W. P. H. C. Rep., 1873, 108. (3) 9, W. R., 598.
(2) I. L. R. 2 All., 778.

neminem excusat is a very good maxim of law, as much applicable to this country as to any other; and I hold that in this case, there being no satisfactory explanation why the present defendant-appellant went to the Court of the District Judge of Azamgarh in appeal instead of coming up to this Court, that the period which has elapsed has not been duly accounted for, so as to justify us in acting under the exceptional provisions of s. 5 of the Limitation law.

I am all the more inclined in this particular case to adopt this view, because throughout the litigation the defendant-appellant never denied that the Rs. 10,000 alleged by the plaintiff to have been the amount of the sale-consideration was the amount agreed upon at the consideration of the sale of the 8th March, 1874, which, indeed, was the main contention in this litigation.

Then, again, there is a period between the 6th December, 1886, the date upon which the memorandum of appeal was returned by the District Judge of Azamgarh, and the 13th December, 1886, the date upon which this appeal was presented to this Court. There has been no endeavour whatever to explain the reason why this delay took place. This appeal, indeed, so far as it has been presented beyond the period of limitation, is not supported either by affidavit or even by any explanation contained in the memorandum of appeal other than the facts which I have already stated.

It is perfectly conceivable that, in conditions of life such as they exist in India, an appellant in the condition of the present defendant-appellant might have felt himself entitled to try an experiment by going into the appellate Court of the District, and then taking his own time, after his memorandum has been returned, to come into this Court to file the same appeal. The statutes of limitation are intended to check such tendency of dilatoriness, and such statutes must have operation. These statutes have been called statutes of repose, but the moment they are allowed to be slackly dealt with, they cease to be statutes of repose, and frustrate the very object which they aim at. These views I expressed in *Husaini Begam* v. *the Collector of Muzaffarnagar* (1), in which I happened to differ with my honorable colleague in that case, but my judgment was upheld by the learned Chief Justice and my

(1) I. L. R., 9 All., 11.

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brothers Straight and Brodhurst on appeal under the Letters Patent (1). I hold therefore that this appeal was preferred to this Court beyond time and, as such, should be dismissed with costs. I order accordingly.

STRAIGHT, J.—I concur with my brother Mahmood and in the conclusion at which he has arrived with regard to the disposal of this appeal. It is not denied now by Mr. *Kashi Prasad* that the appeal has been properly preferred to this Court, and that being so, it must be conceded that it was improperly preferred to the Court of the District Judge. That being so, it undoubtedly rests upon the appellant, who asks us to extend to him the indulgence of s. 5 of the Limitation Act, to satisfy us that he made his appeal to the Court of the District Judge "*bonâ fide*," that is to say, under an honest though mistaken belief, formed with due care and attention, that he was appealing to the right Court. Looking to the circumstance that in the plaint the property was alleged by the plaintiff to be of the value of Rs. 10,000, that upon the basis of that valuation he came into Court and sought to recover possession of it, and to the fact that the defendant never traversed that allegation, but allowed the suit to be tried by the Subordinate Judge upon that footing, I do not think it can be reasonably said on his behalf that he honestly believed the suit one in which the appeal lay to the District Judge. The appellant has filed no affidavit, and we have no sworn assurance of his to the effect of what his learned pleader has now said as to an erroneous impression prevailing in his mind when he filed his appeal in the Court of the District Judge. There are no materials whatever to satisfy me that at the time he filed his appeal in the Court of the District Judge he was acting under an honest though mistaken belief that the appeal lay to that Court. Even, therefore, if analogically I import the sort of indulgence into s. 5 of the Limitation Act which is mentioned in s. 14, the appellant has not shown me that he is entitled to it.

Moreover, apart from the delay that took place in the Court of the District Judge, we have the additional circumstance that for the delay from the 6th December, 1886, when the memorandum of appeal was returned to the appellant by the Judge, to the 13th

(1) I. L. R., 9 All., 655.

December, 1886, when that memorandum was filed in this Court, no explanation is offered on behalf of the appellant. I say most emphatically that when the memorandum of appeal was returned, on the 6th December, 1886, to the appellant, it was his bounden duty to hasten with all alacrity to this Court for the purpose of presenting his appeal, and that not having done so, we have no right to exercise in his favour the discretion conferred upon us. I agree with my brother Mahmood that Mr. *Conlan's* objection must prevail, and this appeal must be and it is dismissed with costs.

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Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell.

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GOPAL SINGH (DEFENDANT) *v.* BHAWANI PRASAD (PLAINTIFF).*

Lease—Guarantee for rent—Indemnity—Continuing guarantee—Death of surety—Act IX of 1872 (*Contract Act*), *ss.* 124, 125, *clause* (2), 126, 129, 131.

One *B* proposed to take a lease of zamíndári property from *M* for the period of eight years at a rental of Rs. 3,000 per annum. *M* declined to grant the lease until the payment of rent during the term of eight years was guaranteed by one *S*, the father of the plaintiff. *S* on his part required a guarantee or indemnity against any rent which might not be paid by *B*, and which he might under his proposed guarantee become liable to pay. The defendant's father, *G*, accordingly gave a guarantee to *S* in the following terms: "And for your satisfaction, I write that if any money remains due from *B* on account of the lease for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." *S* then gave his guarantee to *M*, and he granted the lease to *B*. *G* died on 22nd May, 1880. *B* failed to pay the rent due for the year 1883. *M* having died, his representatives sued *S* on his guarantee and recovered from him the rent due and certain costs and expenses. *S* then died, and the plaintiff, as his representative, brought this action against defendant, the legal representative of *G*, to recover the amount of the decree and costs which *S* had to pay. The Court of first instance decreed the whole claim with costs to be recovered from the estate of *G*, and this decree was confirmed in appeal by the District Judge.

On second appeal it was contended that under s. 131 of the Indian Contract Act, the death of *G* was a complete answer to the claim.

Held, that assuming that the case was that of a continuing guarantee within the meaning of s. 131 of the Indian Contract Act, still, having regard to the object for which the two guarantees were given, it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that *S* should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay, and

* Second Appeal No. 2282 of 1886, from the decree of T. R. Wyer, Esq., Officiating District Judge of Meerut, dated 21st September, 1886, confirming the decree of Babu Brij Pal Das, Officiating Subordinate Judge of Meerut, dated the 9th September, 1886.

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consequently, even if it were a continuing guarantee, the liability of *G* was not determined on his death.

Held further, that neither *G*, if he were alive, nor on his death the defendant, as his representative, can be made liable for costs and expenses which *S* had incurred in defending the previous suit against him for rent brought by the lessor, there being no evidence to show that *S* acted as a prudent man would have done in defending the action against him or was authorized by defendant to defend the suit.

Lloyds v. *Harper* (1) was referred to.

The facts of this case are stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the appellant.

The Hon. *T. Conlan* and Pandit *Moti Lal*, for the respondent.

EDGE, C. J.—One Bahal Singh proposed to take a lease of zamíndári property from the proprietor Rao Maháráj Singh, from the year 1877 to 1884, at a rental of Rs. 3,900 per annum. Rao Maháráj Singh declined to grant the lease until the payment of rent during the time was guaranteed by one Shiban Lal, who was the father of the plaintiff. Shiban Lal on his part required a guarantee or indemnity against any rent which might not be paid by Bahal Singh and which he might under his proposed guarantee become liable to pay. The defendant's father, Ganga Bakhsh, gave a guarantee to Shiban Lal, which, so far as is material, is as translated as follows: "And for your satisfaction, I write that if any money remains due from Lala Balak Rai on account of the lease, for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." Lala Balak Rai was Bahal Singh, the proposed tenant. On his part Shiban Lal then gave his guarantee to Maháráj Singh. Rao Maháráj Singh granted the lease to Bahal Singh. Ganga Bakhsh died on the 22nd May, 1880. Bahal Singh failed to pay the rent which became due for 1883. The representatives of Rao Maháráj Singh, he having died, brought an action on the guarantee given by Shiban Lal to Rao Maháráj Singh, against Shiban Lal, and recovered the amount of the rent due and certain costs and expenses. Shiban Lal paid the amount of the decree. Shiban Lal died before this action was commenced. The plaintiff, who is the legal representative of Shiban

(1) 16 Ch. Div. 290.

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Lal, brought this action to recover the amount of the previous decree and costs which Shiban Lal had incurred in defending the previous action. This action was brought against the defendant who was the legal representative of Ganga Bakhsh. The Subordinate Judge of Meerut decreed the whole claim with costs to be recovered from the property of Ganga Bakhsh. The then District Judge dismissed with costs the appeal which was brought against the decree of the Subordinate Judge.

The question which we have got to determine is whether s 131 of the Indian Contract Act applies to the case so as to make the death of Ganga Bakhsh an answer to the claim. That section says: —"The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions." A continuing guarantee is defined in s. 129 as follows:—"A guarantee which extends to a series of transactions is called a continuing guarantee." Assuming without deciding that this was a continuing guarantee within the meaning of s. 131, I am of opinion, having regard to the transaction which was being guaranteed, and to the fact that it must have been the intention of the parties in the one case that the guarantee given by Shiban Lal should continue during the whole currency of the lease which was granted on the faith of that guarantee, and that the guarantee given by Ganga Bakhsh should continue also during the currency of the lease; in other words, having regard to the object for which those two guarantees were given, that we must conclude that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that Shiban Lal should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay. It is obvious that the lessor would not have granted his lease on a guarantee which might have been determined the next day. It is equally obvious that Shiban Lal would not have executed his contract of guarantee without which the lease would not have been granted, if he were only to receive a guarantee in his turn which might have been determined the following day. Consequently I am of opinion, even if this was a continuing guarantee, that the liability continued notwithstanding the death of Ganga Bakhsh in 1880. The law in

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England in cases of this kind and the principles on which that law is based are fully expressed by the judgments in the case of *Lloyds* v. *Harper* (1). The reason why I do not think it necessary to decide whether this is a continuing guarantee or not within the meaning of ss. 129 and 131, is that I consider it evident that the respective parties clearly intended that the respective guarantees should continue and not be determinable during the currency of the lease, and that the payment of the whole of the rent which might become due under the lease should be guaranteed. Further, I much doubt whether the framers of the Code had before their minds a case like the present. Whether this contract of Ganga Bakhsh is to be called a contract of guarantee, or a contract of indemnity, appears to me, to be immaterial. Ganga Bakhsh in any event was a surety, if it was a contract of guarantee, and it is to be distinguished from a contract of indemnity. I fail to see how Ganga Bakhsh, if he were alive, could be, or how his representative can be, made liable for the costs of Shiban Lal incurred in defending the action brought against him, or for the costs or expenses which he was obliged to pay to the plaintiff in that action. There could have been no defence to that action. The payment of the rent was the only thing guaranteed. If it was a contract of indemnity as distinguished from a contract of guarantee, the plaintiff could not be entitled to the cost or expenses of the previous action unless he brought the case within clause (2) of s. 125 of the Indian Contract Act. In this case there is no evidence to show that Shiban Lal acted as a prudent man would have done in defending the action against him, nor did the defendant authorize Shiban Lal to defend that suit. I am consequently of opinion that the plaintiff was entitled to a decree only for the actual rent which Shiban Lal had to pay, and not for any interest, cost or expenses incurred by the lessor or Shiban Lal prior to the previous suit. The result will be that the decree below will be varied by a decree in favour of the plaintiff for Rs. 3,417 with costs of this litigation proportionate to that sum and with interest at 6 per cent. on that sum from the commencement of the suit to the date of the payment. Costs of this appeal according to the success of the parties.

TYRRELL, J.—I concur.

Decree modified.

(1) L. R., 16 Ch. Div., 290.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

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Voluntary transfer—Undue influence—Act IX of 1872 *(Contract Act), s.* 16.

In a transaction between two persons where one is so situated as to be under the control and influence of the other, the Courts in this country have to see, that such other does not unduly and unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognize.

Where a fiduciary or quasi-fiduciary relation had existed courts of equity have invariably placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of this beneficial jurisdiction is not confined to cases only between guardian and ward, attorney and client, father and son, but the relief thus granted stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another.

The plaintiff who on the death of the widow of his brother became entitled to the estate of the deceased found himself resisted in his claim by wealthy relatives. He was a man without means. The defendant took him to his house, kept him there, found him all the money for the purpose of carrying on his litigation with his relatives, in which the plaintiff succeeded. While the litigation for mutation of names in respect of the property was pending in the revenue Court, and while plaintiff was residing with the defendant, he executed a sale deed in favor of defendant's brother for the nominal consideration of Rs. 9,500 of half the property he claimed, and again, shortly after the mutation case had terminated in his favor, he executed a deed of endowment of the remaining half in favor of a temple founded by the ancestor of the defendant and in which the defendant was interested, and the result was that plaintiff was left as poor as he was when he first came into the defendant's hands.

Plaintiff sued for cancellation of the deed of endowment on the ground that the same had been obtained from him by the exercise of undue influence and by means of fraud, and obtained a decree.

On appeal by the defendant it was held; that looking at all the facts, such a relation between plaintiff and defendant in the course of the year 1885 had been established as to cast upon the latter the obligation of satisfying the Court that the transaction, which was given effect to by the deed of endowment, was an honest and *bonâ fide* transaction and one that ought to be upheld.

THIS was a suit for cancellation of a document, and the facts in connection with the case are as follow :—

One Khumani Ram had three sons, *viz.*, Sita Ram, Mukand Ram and Kesho Das. Sita Ram's son is Shib Charan. Kesho Das

* First Appeal No. 92, of 1887, from a decree of Maulvi Sayyid Zain-ul-abdin Khan, Subordinate Judge of Moradabad, dated the 10th March, 1887.

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left a son Salig Ram, and Mukand Ram had two sons, Ram Ratan and Parbhu Lal, of whom Parbhu Lal is the plaintiff in the suit. Ram Ratan died, leaving a widow Gulab Kuar, who on his death inherited the zamindari property left by him. On 3rd March, 1885, Gulab Kuar died, and on her death disputes arose between the plaintiff on one side and Shib Charan and Salig Ram on the other regarding the property left by Ram Ratan. The plaintiff is a poor man without any means, while his relatives are wealthy people. The defendant by some means or other found out the plaintiff, took him to his own house, kept him there and found all the money to enable the plaintiff to establish his claim for mutation of names in his favour in respect of the property. In fact it was solely through the exertions of the defendant that plaintiff eventually succeeded in the revenue Court, and by an order dated the 5th of August, 1885, his name was entered in the revenue register in respect of the said property. While he was litigating in the revenue Court with his cousins, the plaintiff was living with the defendant and entirely guided by him. On the 5th April, 1885, while the petition of the plaintiff to have his name recorded in respect of the property of Ram Ratan was pending in the revenue Court, he executed a sale-deed in respect of half of the entire zamindari and landed property forming the estate of Ram Ratan in favour of Sriram, brother of the defendant, for the nominal consideration of Rs. 9,500. On the 22nd December, 1885, when entirely under the control and influence of the defendant, the plaintiff executed the deed of endowment sought to be cancelled. This deed purports to be a gift of the remaining half of the zamindari estate left by Ram Ratan to the temple of "Lachmi Narain" situated in mauza Badwan Darwaza, pargana Sambhal, a temple built by the ancestor of the defendant and which he was then in possession and charge of. The motive for the gift is recited in the deeds to be charity for the benefit of the soul of the donor, and it goes on to say "I (the donor) have withdrawn my own proprietorship from it and have made it an endowment permanently, and having appointed Mahárája Sital Pershad, the aforesaid manager of the temple, as a manager of the property made a gift of, and have put him in possession thereof. The aforesaid manager shall use the income of the property made a gift of in charitable purposes, i.e., in supporting Fakirs and Sadhus and in

the said temple, as per instructions I give below. The manager aforesaid shall be at liberty to appoint in his lifetime any one he chooses from the members of his family as manager of the property made a gift of. On the death of the manager, the most worthy of his heirs or he whom he nominates manager of the property made a gift of, shall be manager. Thus managers shall continue to be appointed, and except a member of the family of the manager, no one *from another family shall be appointed a manager.*" The *income* of the property was directed to be spent in the manner following:—"Half the income in supplying food, &c., to Sadhus, one-fourth of the income in providing for the bhog of Sri Ram Chandarji, decorating the temple, &c., &c. The remaining one-fourth in paying the salaries of servants appointed to realize the income of the property made a gift of, servants attached to the temple and servants employed to look after its other management, and to prevent it from wasting and to look after the repairs, &c., of the temple."

The gift was ultimately followed by *mutation of names* taking place in respect of the property comprised in the gift in favor of the defendant.

On the above facts, the plaintiff alleging that the deed of endowment had been obtained from him by the defendant by the exercise of undue influence and fraud, sought for its cancellation and prayed for recovery of possession of the property comprised in it.

The defendant denied that the plaintiff had been unduly influenced by him to make the gift, and he contended that the gift had been completed and acted upon, and that the plaintiff who has no wife nor children to provide for, made the gift to the temple for the benefit of his soul. He denied having derived any personal benefit from the gift.

The learned Subordinate Judge of Moradabad laid down the following issues for determination:—

1. Whether the plaintiff gets giddiness of head every second or third year, and by reason thereof he is entirely in a state of insanity for seven or eight months; or, as stated by the defendant, the plaintiff is always in his proper senses.

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2. Whether the defendant took the plaintiff when he was insane to his own house and duped him by making him indulge largely in *bhang* and *charas*, prevented him from seeing any one, made him execute a deed of endowment in respect of the property in dispute and got it registered by undue influence, when he was insane and in a state of intoxication, and the plaintiff being in the above state, did not understand the meaning thereof and had it completed; or, as stated by the defendant, all these allegations of the plaintiff are wrong, the plaintiff having voluntarily got the deed of endowment fully completed while in his proper senses.

3. Whether there remains any property with the plaintiff for his support, or the whole of his property has been taken away by the defendant during his insanity.

4. Does the condition in the deed of endowment as to the appointment of the munsarim and mutwalli of the property given, show any selfish motive on the part of the defendant? Is the plaintiff legally and justly competent to get the deed of endowment cancelled? Should the reliefs sought by the plaintiff in this case be in law and justice granted as against the defendant or not?

The learned Subordinate Judge then found on the first issue, that the plaintiff was not suffering from any disease causing insanity or loss of understanding, but that he was a man of weak understanding and insufficient intelligence, addicted to intoxication and with no forethought.

On the second issue, it was found that at the time of the execution of the deed of gift the plaintiff certainly received so much kindness and benefit at the hands of the defendant as to lead him to think that the defendant and members of his family were his only well-wishers. He had then been highly displeased with his own cousins and determined that they should not get the property after his death. He followed any advice that defendant gave him, and following defendant's advice he executed the deed of gift without knowing or considering its consequences. It was also found that the defendant took the precaution to keep the plaintiff out of the reach of any advice as regards the deed, and the deed of endowment was not obtained in good faith by the defendant nor

did the plaintiff execute it upon a proper and sufficient consideration of its consequences.

On the third issue it was found that in executing the deed of endowment plaintiff parted with every bit of property he had and he is now totally destitute of any means.

On the fourth issue the Court found that with reference to the conditions in the deed regarding the appointment of munsarim and mutwalli, it was quite clear that the defendant was actuated by motives of gain to himself in procuring the gift from the plaintiff, and accordingly the claim of the plaintiff was decreed.

On appeal it was chiefly contended by the defendant that he did not possess any influence over the plaintiff and had not unduly exercised the same for the purpose of obtaining the deed.

Mr. *G. E. Ross* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STRAIGHT, J.—This appeal relates to a suit instituted by the plaintiff-respondent against the defendant-appellant upon the following state of facts as disclosed in the plaint. The plaintiff said that he was the absolute proprietor of a 10 biswas zemindari share, out of 20 biswas of mauza Bhartal Madapur, pargana Sambhal, and 118 bighas 1 biswa of resumed muáfi land in mauza Isapur, and of 179 bighas 11 biswas of resumed muáfi land also situate in pargana Sambhal, all of such lands being in the mahál of Narain Das, and their value Rs. 20,000. The plaint goes on to say: "that the plaintiff gets such giddiness of head that his mind is deranged and it lasts for 8 or 9 months at a time, whereby the plaintiff is disabled from distinguishing between good and bad and gain and loss. When he recovers from the disease, he is restored to his proper senses and can well understand his own gain and loss, and is in as sound a state of mind as any other person."

In the 3rd paragraph of the plaint it was stated as follows:—

"In March, 1885, the plaintiff had his usual fit, and in consequence of the disease and derangement of mind, he fell out and

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became annoyed with his relations. When the defendant and his brothers became aware of this, they took the plaintiff from mauza Bhartal, the place of his residence, to their own house at Sambhal and treated him very kindly and courteously, but they did not allow him to go out of their house, and they even appointed men to prevent him from going out and talking to any one. As the plaintiff is also in the habit of taking *bhang* and *charas*, the defendant cunningly made him indulge in those things very largely, so that his mental derangement increased, and he began to be always under the influence of intoxication and to regard the defendant and his family as his well-wishers. When the defendant and the members of his family were fully satisfied that the plaintiff was always under the effect of intoxication and also in a state of mental derangement, and that he was under their undue influence, they dishonestly and cunningly obtained from him a deed of sale for Rs. 9,500, dated the 5th April, 1885, in favour of Sri Ram, defendant's brother, in respect of half of the property mentioned in para. 1 of this plaint, without paying a single farthing as sale-consideration. The plaintiff, not being in his proper senses and being under the undue influence of the defendant, executed the sale-deed without knowing whether it was advantageous or prejudicial to him."

The 4th paragraph says :—"Not content with this, the defendant and the members of his family asked the plaintiff to execute a deed of endowment in respect of the remaining half of the property mentioned in para. 1 of this plaint. The plaintiff, being in a state of mental derangement and under the effect of intoxication and the undue influence of the defendant, executed, without consulting his own interest, a registered deed of endowment, on the 22nd December, 1885, as desired by the defendant, to the effect that he had permanently endowed the remaining half of the property for charitable expenses to the temple of Manokamna built by the ancestor of Sital Prasad, adopted son of Lachman Das, resident of Sambhal, appointing the said Sital Prasad, the *munsarim* (manager) of the temple, as the *munsarim* of the property; that the *munsarim* should apply the income of the endowed property to charitable expenses; that after the death of the *munsarim* one of his heirs who might be fit or who might be named by him

should be appointed to the post; and that none from another family than that of the *munsarim* should be appointed. This passage fully shows the fraud and artifice of the defendant in that he himself became the *munsarim* and obtained half the property under an illegal deed of endowment and half under an illegal deed of sale."

In the 5th paragraph it is stated:—"As the plaintiff was under the power of the defendant and his family, and owing to undue influence, insanity and the state of intoxication, used to do whatever they required of him, he, without consulting his own interest, signed the deed of endowment as drawn up at the instance of, and made over to him by the defendant, and owing to the artifice of the defendant, the plaintiff got no opportunity of consulting any other person, as the defendant always took care to prevent the plaintiff from seeing any one, a fact known to all the people of the town of Sambhal. Under the above circumstances both the contracts, namely, the one contained in the deed of sale and that contained in the deed of endowment, are voidable at the will of the plaintiff. The defendant, moreover, got a general power of attorney executed on the part of the plaintiff in favour of Nihaluddin, son of his own general attorney Nazir-ud-din, whom he caused to make on the part of the plaintiff any statement that he thought to be favourable to himself."

In the 6th paragraph it is said:—"After the completion of all the proceedings by which the defendant illegally obtained the whole property of the plaintiff, he turned the plaintiff out of his house and the plaintiff went away to his own house. After a short period the plaintiff recovered from the disease of giddiness of head and was restored to his proper senses, when he was informed by his relations of all the fraudulent proceedings of the defendant and his family, and he became aware positively that all his property had already been illegally obtained by the defendant by fraud. The plaintiff, having then consulted other competent persons, learnt that the deed of endowment and sale-deed executed by him in a state of insanity were by all means liable to be cancelled. For the present plaintiff, for want of means, sues only for the cancelment of the deed of endowment, and for the cancelment of the sale-deed he will bring a suit afterwards."

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In the 7th paragraph it is stated :—"The plaintiff was paid not a single farthing as consideration of the sale-deed, nor did he receive any benefit by executing the deed of endowment, nor was it executed voluntarily ; nay, it was executed while the plaintiff was insane and under the undue influence of the defendant. The defendant obtained half the property from the plaintiff by means of the illegal sale-deed and half by means of the illegal deed of endowment, and there remained no property with the plaintiff. All these proceedings were due to the cunningness and dishonesty of the defendant. The cause of action arose within the jurisdiction of this Court at Bhartal Madapur, pargana Sambhal, on the 15th February, 1886, when the plaintiff recovered his proper senses and was informed of the above fact."

Accordingly, upon these statements of the grounds upon which he came into Court, the plaintiff asked the following reliefs, namely :—

"(*a*). That the deed of endowment, dated the 22nd December, 1885, which the defendant illegally obtained from the plaintiff by undue influence and fraud, while the plaintiff was insane, ill and under the effect of intoxication, may be cancelled and declared invalid and void.

"(*b*). That the defendant may be dispossessed and the plaintiff duly put in absolute possession of the 5 biswas zamindari and malguzari share of mauza Bhartal Madapur, pargana Sambhal, 59 bighas and 10 biswansis of resumed muáfi land in mauza Isapur out of the plot of 118 bighas and 1 biswa numbered as below, in the mahál of Chaudhri Tika Singh, and 89 bighas, 15 biswas and 10 biswansis of resumed muáfi land out of the plot of 179 bighas and 11 biswas, numbered as below, in mauza Hazrat Nagar Garhi, pargana Sambhal.

"(*c*). That all proper directions for the security of the said reliefs may be given to protect the plaintiff from the fraud and artifices of the defendant, and to enable him to obtain peaceable possession of the property claimed."

No doubt the terms of the plaint were exceedingly prolix and discursive, and there is much repetition in it which was unnecessary for the purpose of presenting the case the plaintiff had to make

as the basis for the relief he sought. It has been subjected to very severe criticisms at the hands of the learned counsel for the defendant-appellant, and the learned pleader who is associated with him has boldly asserted that there is really nothing up on the face of it that the defendant was called upon to answer; the allegations were so vague and the charges in it so general, that the defendant had really no obligation cast upon him either to traverse those allegations in his written statement or to appear in the witness-box to contradict them. I disagree with the learned pleader in his contention. It is useless in this country for us to expect that conciseness or certainty in pleading which is required in the English Courts. I have no doubt that the person who framed the plaint in this particular case, from a not unnatural desire to put his client's story in the strongest aspect upon the face of the plaint, imagined the best way to do so was to draw it in the manner it has been drawn, and so introduced a good deal of matter which was not actually capable of proof, which was of no assistance to the Court below, and is certainly of no assistance to us in coming to a conclusion as to the propriety or otherwise of the judgment of the learned Subordinate Judge. I do think however, that eliminating from this plaint a mass of matter which is wholly superfluous, it may be taken to represent this much, that the plaintiff was a person of weak intellect, that he was addicted to the practice of drinking *bhang* and smoking *ganja*, practices not calculated to improve his mental condition; that at the time of the decease of his sister-in-law, Gulab Kuar, he was threatened by his relatives with opposition to his obtaining the estate of his deceased brother, Ram Ratan, to which he was undoubtedly entitled; that they did oppose him in the mutation proceedings; and that the defendant, a rich Brahman and proprietor of a temple in Sambhal, took advantage of this and got him to his residence, keeping him there while the mutation proceedings were going on, treating him with kindness and pandering to his passion for drink and narcotic smoking, at the same time providing him with money to carry on the mutation proceedings in which he was being wrongfully resisted; that in the course of doing so he obtained from him in favour of his (the defendant's) brother a sale-deed of part of his property for Rs. 9,500, not a pice of which ever was paid; and subsequently obtained from

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him the deed of endowment the subject-matter of the present suit as a gift and for no consideration in favour of his (the defendant's) temple, and having thus served all his ends, and having stripped the plaintiff of the whole of his property, turned him adrift. These are in effect the grounds on which the plaintiff comes into Court to avoid the deed of endowment of the 22nd December, 1885, by the execution of which, in conjunction with the earlier conveyance, he had effectually deprived himself of the whole of the property, which he had only succeeded in securing in the early part of the same year.

How then did the defendant, against whom these charges were formulated, meet them? For example, did he deny in terms in his written statement that the allegation in the plaint, which is repeated twice, namely, that the sale to the defendant's brother Sri Ram, ostensibly for Rs. 9,500, was a sale in respect of which no consideration had passed? Did he deny the assertions of the plaintiff that the defendant got him into his house and kept him there for a long consecutive period of time in 1885? Did he deny the statement that subsequently to the execution of the deed of endowment in 1885, he turned the plaintiff adrift and left him to shift for himself without a pice remaining to him of the property he had only obtained a short time before? There is no denial throughout the whole of the statement of defence of any one of these allegations, and it may be convenient for me here also to remark that the defendant has never presented himself as a witness in the cause to negative the assertions which were made by the plaintiff in his plaint, and which have more or less been proved by him upon his oath.

I do not conceal from myself, and my brother Brodhurst is equally agreed with me, that the case is one of very great difficulty. For it is of the most serious public importance that the free and voluntary contracts of persons in favour of others should, in no way, be interfered with or disturbed by the Courts of law, and it is not because a man chooses to make an ill-considered or foolish contract, that therefore the Courts of law are to step in and relieve him of the consequences of his act. Neither Courts of law nor Courts of equity have ever attempted, nor will they ever attempt, to

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set aside such transactions. But what the Courts in this country will do, is to see that, where one person is so situated as to be under the control and influence of another, such other does not unduly or unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognise. No doubt there is one class of cases in which there being no fiduciary or *quasi* fiduciary relation between the parties, Courts of equity have interfered with contracts into which the persons claiming relief have entered upon various grounds. But in such cases they have required that the parties seeking that relief should themselves establish their title to relief. On the other hand, where a fiduciary or *quasi* fiduciary relation had existed, Courts of equity have always placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The matter before us is not that of a guardian and a ward, or of an attorney and client, or of a father and son, or of any of the more commonly recognized relations which involve such consequences. But these are not exhaustive and on this head I may conveniently refer to a passage from the notes to *Huguenin* v. *Baseley* (1):—"In *Dent* v. *Bennett* (2), where a gift obtained by a medical attendant from his patient was set aside by Lord Cottenham, it was argued upon the authority of the civil law and some reported cases, that medical attendants were, upon questions of this kind, within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy. 'Undoubtedly,' observed Lord Cottenham, 'they are; but I will not narrow the rule, or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of the Court by any enumeration of the description of persons against whom it ought to be most freely exercised'." So at another place it is observed: "The principle upon which Courts of equity set aside such donations has been so accurately stated by Sir Samuel Romilly, in his argument, that Lord Cottenham,

(1) 2 White and Tudor's L. C., 4th ed., p. 592.
(2) 4 My. and Cr. 262.

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in the case of *Dent* v. *Bennett* (1), fully adopted it. 'The relief,' observes his Lordship, as Sir Samuel Romilly says in his celebrated reply in *Huguenin* v. *Baseley* (2) (from the hearing of which I received so much pleasure that the recollection of it has not been diminished by the lapse of more than thirty years), 'the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another.'"

No useful purpose would be served by my travelling at length through the many authorities that are referred to in the notes to *Huguenin* v. *Baseley* (2), though I may in this connection conveniently refer to what is said in Story's Equity Jurisprudence on the same subject. In para. 234 of his "*Equity Jurisprudence*," edited by Grigsby, it is observed:—"For it has been well remarked, that although there is no direct proof that a man is *non compos*, or delirious, yet, if he is a man of weak understanding, and is harassed and uneasy at the time, or if the deed is executed by him *in extremis*, or when he is a paralytic, it cannot be supposed that he had a mind adequate to the business which he was about, and he might be very easily imposed upon." In paragraph 237 of the same book it is remarked, quoting from a judgment of Lord Wynford:—"'But those who, from imbecility of mind, are incapable of taking care of themselves, are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood. A bargain, therefore, into which a weak one is drawn, under the influence of either of these, ought not to be held valid, for the law requires that good faith should be observed in all transactions between man and man.' And addressing himself to the case before him, he added, 'If this conveyance could be impeached on the ground of the imbecility of F only, a sufficient case has not been made out to render it invalid; for the imbecility must be such as would justify a jury, under a commission of lunacy, in putting his property and person under the protection of the chancellor. But a degree of weakness of intellect, far below that which would justify such a proceeding, coupled with other circumstances, to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed.'" Summing up the doctrine, Story remarks in para. 238 and says:—"The doc-

(1) 4 My. and Cr., 262. (2) 2 Wh. and T. L. C. 592.

trine, therefore, may be laid down as generally true 'that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in Courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning or artifice, or undue influence.' (But the simple fact that the intellectual capacity of one party to contract is below that of the average of mankind, does not alone furnish sufficient ground for setting aside the contract.) The rule of the common law seems to have gone further in cases of wills (for, it is said, that perhaps it can hardly be extended to deeds without circumstances of fraud or imposition); since the common law requires that a person, to dispose of his property by will, should be of sound and disposing memory, which imports that the testator should have understanding to dispose of his estate with judgment and discretion; and this is to be collected from his words, actions and behaviour at the time, and not merely from his being able to give a plain answer to a common question. But, as fraud in regard to the making of wills of real estate belongs in a peculiar manner to Courts of law, and fraud in regard to personal estate to the ecclesiastical Courts, although sometimes relievable in equity, that part of the subject seems more proper to be discussed in a different treatise." And there is another passage in para. 239 in which it is said:—"On this account Courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment; and if there is the slightest ground to suspect oppression or imposition in such cases, they will set the contracts aside. Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency as to justify the Court in setting aside a contract made by him, on account of some oppression, or fraudulent advantage, or imposition, attendant upon it."

Now I might quote endless passages from the judgments of learned judges upon this particular subject and from legal works which have been referred to, notably Pollock on Contracts, at pages 282 and 578, but it is unnecessary for me to do so, because I have shown, I think sufficiently, what the principle is and what

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the rule by which, when the question arises, cases of this kind are to be governed. They have been recognized in India in the Contract Act, which provides that every person is capable of contracting, who is of the age to contract, and who contracts of his own free consent, which means when his consent has not been obtained or caused by (1) coercion, as defined in s. 15, or (2) undue influence as defined in s. 16, &c.

Now the expression "undue influence" is defined in s. 16 as follows:—

(1). "When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained."

(2). "When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that, to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion."

Now those two classes of what is described as undue influence in s. 16 seem thoroughly to cover the ground which is recognized by the principles enunciated in the notes to *Huguenin* v. *Baseley* (1), and to the doctrine promulgated in Story's Equity Jurisprudence, to which I have referred. It has not been denied, and, indeed Mr. *Ross* would not have contended for so unsustainable a proposition, that assuming there was a relationship such as that which is contemplated in clause (1), s. 16 of the Contract Act, or such a *quasi* relationship, once established, the *onus* would not rest upon the party who held that position towards the person who sought to avoid the deed to prove that the transaction it embodied was a fair and proper one. But by way of illustration it will not be out of place to refer to the well-known case of *Lyon* v. *Home* (2) as showing to what extent a Court of equity has pushed this principle. In passing, I need only say one word with regard to the case of *Selby* v. *Jackson* (3) quoted by Mr. *Ross*. Mr. *Ross* referred to it as an authority for the position that though a man may be subject

(1) 2 Wh. and T. L. C. 592. (2) L. R., 6 Eq., 655.
(3) L. J., 13 Eq., 240.

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to temporary fits of insanity, that during his lucid intervals he is not incapable of making a legal and binding contract. No one doubts this and I did not require the authority of *Selby* v. *Jackson* to inform me of it. The only remark I have to make about that case, is that apart from the finding of fact that the plaintiff was of sound mind when he made the contract, both the Master of the Rolls and the Lord Chancellor in appeal were very clearly of opinion, that the person who was seeking to avoid the contract itself was very greatly benefited by it. Reverting to the case before us, I then have to see whether, looking to the respective positions of the plaintiff and the defendant and to the facts relating to the deed of gift as a whole, the transaction is one that should be allowed to stand. I shall not repeat at length the allegations that are made by the plaintiff in his plaint and the mode in which they were met by the defendant, but it does seem to me that, taking them in conjunction with the proof on the record, there was evidence to show that when Gulab Kuar died leaving this property behind her, it by some means or another became known to the defendant that the plaintiff was the person who was entitled to that property, but that he was opposed by his wealthy relatives; that he was helpless to resist them, being entirely without means, having up to her death subsisted on his sister-in-law's charity; that he was a poor Brahman and therefore likely to be extremely susceptible to the influence of the defendant; that knowing all this the defendant got the plaintiff to his house and kept him there, and that during the time the quarrels were going on between him and his relatives, he did find him with money, how much does not appear, though it could not have been any very large sum, for the purpose of instructing pleaders to look after his interest in the mutation proceedings. That the defendant was not purely disinterested in his action is obvious from the admitted fact, that on the 5th April, 1885, a deed of sale was executed by the plaintiff in favour of the defendant's brother of half of the property to which he was entitled for Rs. 9,500. Whether the consideration was or was not paid is not clear, though, on the one hand, we have the plaintiff's assertion that it was not, while the defendant on the other has neither asserted nor proved that it was. I cannot help under such circumstances feeling that it was not; more particularly as it can hardly be suggested that so large a sum of

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money was expended over the mutation proceedings, which commenced in March, 1885, and finally came to an end by the decision of the Collector on appeal on the 24th September, 1885. Proceedings of that kind would at the outside only involve an expenditure of a few hundred rupees, and, indeed, the defendant does not suggest that any large sum was advanced for the purpose. The matter therefore stands thus, that the defendant, a well-to-do Brahman, with no special claim on him to do so, was entertaining the plaintiff in his house under the circumstances described, and that first in the month of April, 1885, a deed of sale of half of his property, and afterwards in December of the same year a deed of gift of the remaining half, is obtained from him, with the result that he is left as poor as he was when he first came into the defendant's hands.

Looking at all the facts, I am constrained to the conclusion that there was such a relation in the course of the year 1885 between the plaintiff and the defendant as casts upon the latter the obligation of satisfying us that the transaction of December, 1885, was an honest and *bonâ fide* transaction and one that we ought to sustain.

It is quite clear, as has been said in the authorities to which I have referred, that the more well-understood relations of guardian and ward, attorney and client, and so forth, are not exhaustive of the relations in respect of which an obligation rests on the party, who seeks to benefit by the transaction, of showing that it was a voluntary *bonâ fide* and honest one. Nor can it, in my opinion, be seriously suggested that, because the defendant was not the person in whose favour the gift was made, in the sense that the property was endowed to the temple and did not pass to him personally, therefore the case is to be regarded in a different light. That fact does not appear to me to alter the character of the transaction in the least. A priest, who takes advantage of his position and unduly uses his influence with another, whom he knows to be susceptible of such influence, for the purpose of inducing that other to make a gift or donation in favour of a religious society or institution, is bound, if that gift or donation is afterwards impeached, to show that it was a perfectly *bonâ fide* and proper transaction. Applying a like principle to the present case, and that a rich Brahman like the defendant would have great influence over a

poor Brahman in the position of the plaintiff is abundantly obvious, what has the defendant proved? I have already said that he has never ventured into the witness-box, nor has his brother, the vendee, under the sale-deed of April, 1885. He has put forward evidence to show that in the mutation proceedings the plaintiff took an intelligent part. Is there anything very surprising in that? The man wanted to get his property, and it would have been an extraordinary thing had he not shown himself interested in those proceedings. Much stress was laid by Mr. *Ross* upon the fact that the cause of action was originally stated in the plaint as having arisen on the 15th February, 1886, but that the plaintiff came in afterwards and applied to alter the day, because he knew he would be met with the circumstance that on the 17th February he went to the mutation department for the purpose of causing mutation of names in favour of the defendant. I confess I am at a loss to see what is the force of this. If a man under the influence of another enters into a transaction of this kind, of course he will do all that is necessary to carry it out so long as the influence was upon him. It was never suggested that before the plaintiff was turned out of the defendant's house he sought to repudiate the deed of gift; on the contrary, his case is this, that it was not until he realized the way in which the defendant had treated him, he came to understand how he had been stripped of his property. I can only say that upon a review of all the circumstances of this case my firm conviction is that the defendant did get hold of the plaintiff, and did take undue advantage of him and his position of dependence to obtain from him the deed of gift. The transaction is, to say the least of it, a most suspicious one, and its suspicious character is significantly enhanced by the circumstance that the defendant never dared to go into the witness-box to show how it was that the property was sold to his brother, how it was that the deed of endowment came about, and to explain all the other circumstances, the outcome of which was that the plaintiff was left absolutely without a pice worth of property or even the means of bare subsistence.

The case is one that has caused me very anxious thought and serious consideration, and if I have come to an erroneous conclusion, it is not for want of having looked at it in all its aspects.

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The learned Subordinate Judge who tried this case, though portions of his judgment are somewhat obscure, appears to me to have travelled along pretty much the same line of thought that I have in dealing with the matter, and I have read his judgment several times. Having seen the plaintiff in the box he says of him :—"I think that this man is not a man of ordinary intellect ; he is a weak man, and can be easily induced; the defendant is a wealthy and well-to-do Brahman of a temple in the city ; he got hold of this man, and he took him to his house. The man was much frightened at the attitude of his relatives with regard to the property of his brother, and that alarm was not lessened but rather stimulated by the defendant. The defendant supplied him with money for the purposes of mutation proceedings and he preserved control over him. He induced him to think that if he did not put his property out of the reach of his relatives, they would do him some harm, and the consequence was that half of it was sold and the other half of it went into the endowment." That is the finding of the Subordinate Judge upon it, and he has held that, looking to the respective positions of these two men, namely, the well-to-do Brahman and the temple owner on the one hand, and the impecunious Brahman the plaintiff on the other, there is no doubt that influence was brought to bear on him, and that under the influence he made the sale-deed and the deed of endowment. This appears to me to be the view of the learned Subordinate Judge, and I cannot lose sight of the fact that he had the opportunity of seeing the plaintiff in the witness-box, and he has told us what he thinks about him, and what effect his appearance and demeanour had upon his mind. I cannot but conclude, from what the Subordinate Judge (who is a Subordinate Judge of many long years of experience, and for whose opinion I entertain a very high respect) says, that this plaintiff was a man not up to the ordinary standard of intelligence and easily influenced by persons of stronger will. I think the transaction he seeks to avoid was in itself of so hopelessly improvident a character, that coupled with the other facts in the case it was on the defendant to satisfy us by his oath in the witness-box that it ought to be sustained. He has not done so, nor does the evidence of his witness Harchand improve the matter, for it only shows that the draft of this particular deed of gift had

been prepared by the defendant, and that during the whole time of its being written out the plaintiff was sitting at the elbow of the defendant. I am not prepared to say that the decision of the Subordinate Judge was an erroneous decision, and I therefore dismiss the appeal with costs.

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BRODHURST, J.—I concur.

Appeal dismissed.

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June 1.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

TOTA (DEFENDANT) *v.* SARDUL SINGH (PLAINTIFF).*

Public way—Obstruction by building—Suit by zemíndár for removal of building —Special damage—Right to sue.

The plaintiff who is the zemíndár of the village brought an action claiming to have a chabutra or building erected by the defendant in one of the village roads removed. The road in question was a *katcha* road used by the village over which the public have a right of way and it had been dedicated as a road for the use and convenience of the general public. The plaintiff got a decree for the removal of the chabutra and the defendant appealed.

Held, that the rule of English law that a member of the public cannot maintain an action for obstruction to a public road without showing special injury to himself beyond that suffered by any member of the public, does not apply to a zemíndár who or whose predecessor in title had dedicated to the public the road over his zemíndári land. A zemíndár in giving the public right of road or way over his land does not give the public or any one else a right to interfere with the soil of the road as by erecting a building upon it. In such a case the zemíndár has in common with the public the right to use the road as a road and, over and above it, he has a right to the soil in the road, which he had never given to the public. In an action of this kind, the zemíndár does not sue as a guardian of the public but in respect of an interference with his own rights of property.

Baroda Prasad Mustafee v. *Gorachand Mustafee* (1) discussed.

Dovaston v. *Payne* (2). *R.* v. *Pratt* (3). *Rolls* v. *Vestry of St. George the Martyr, Southwark* (4), and *Goodson* v. *Richardson* (5) referred to.

In this case the plaintiff, Mahárája Sardul Singh of Kishengarh, sued as zemindar and muáfidár of the village Rilsown for the removal of a *chabutra* or building erected by the defendant in one of the village roads.

* Second Appeal No. 2303 of 1886, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Agra, dated the 15th December, 1886, reversing a decree of Pandit Alopi Prasad, Munsif of Muttra, dated the 6th August, 1886.

(1) 12, W. R. *Civ. R.*, 160.
(2) 2 Sm. L. C., 9th Ed., 154.
(3) 4 E. and B. 860.
(4) 14 Ch. D. 785.
(5) L. R. 9, Ch. 221.

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The Munsif of Muthra, holding that the building complained of was not a recent construction, dismissed the suit. In appeal, the learned Subordinate Judge of Agra differing from the Munsif in his view of the facts decreed the claim.

In second appeal the defendant for the first time contended, that the road being a public thoroughfare, the plaintiff who had not proved any special damage to him from the obstruction complained of, had no right of action. Upon this contention the following issues were remitted for trial to the lower appellate Court, *viz.*:—

1. Does the land whereon the building in dispute is erected belong to the plaintiff or is it a public thoroughfare?

2. If the latter, has the building erected by the defendant caused any special damage to the plaintiff such as would entitle him to sue for demolition thereof?

Upon these issues the lower appellate Court found that the road passed through and on the land which belonged to the plaintiff, who is the zemíndár and muáfidár of the village, and it was used by the village, and over it the public have a right-of-way; that it had been dedicated as a road for the use and convenience of the public, and the plaintiff has not suffered any greater damage than any one of the public.

Munshi *Madho Parshad*, for the appellant.

The Hon'ble Pandit *Ajudhia Nath* and Munshi *Kashi Parshad*, for the respondent.

EDGE, C. J.—In this case the plaintiff brought an action claiming to have a *chabutra* or building which had been erected by the defendant on one of the village roads removed. The plaintiff is the zemíndár. The road in question is a *katcha* road used by the village and over which the public have a right-of-way. The lower appellate Court found that the road passed through and on the land which belonged to the plaintiff, zemíndár, and that it had been dedicated as a road for the use and convenience of the general public. The lower appellate Court gave a decree for the removal of the *chabutra*, and the defendant has appealed.

Pecuniarily the plaintiff has not suffered any greater damage than anyone of the public, as has been found. It is contended

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here, on the authority of two cases decided in Calcutta and one case decided in this Court, that the action is not maintainable without proof of special damage. In the first case, *Baroda Pershad Mustafi* v. *Gora Chand Mustafi* (1), Sir Barnes Peacock held that the person who had dedicated the road could not, any more than any other member of the public, maintain an action for the obstruction of the highway without showing special damage. It is quite plain that according to the law of England and the law here, as laid down in those cases, a member of the public cannot maintain an action of the kind without proving a special injury to himself beyond that suffered by the public. I do not think that this rule of law applies to the case of a zemíndár, who, or whose predecessor in title, had dedicated to the public the road over the zemíndár's land. When a land-holder in England or zemíndár here gives the public a right of road or way over his land, he only dedicates or gives the public a right to use the road for the purposes of a road. He does not give the public or any one else a right to interfere with the soil of the road, as for instance, by building a house upon it or turning the road into a garden. In the case decided by Sir Barnes Peacock that learned Judge seemed to think that if the plaintiff in that case were allowed to maintain his action, all the public would have a general right to maintain an action against the defendant. I think that learned Judge overlooked the distinction between the rights of the public and the rights of the zemíndár. The right of the public to go along the road and use the road as a road was a right which the zemíndár also had. The zemíndár beyond the public had a right to the soil in the road which he had never given to the public, so that, in an action of this kind, the zemíndár is suing not as a guardian of the public as was suggested by Sir Barnes Peacock, but in respect of an interference of his own rights of property.

The other Calcutta case, *Bhugeeruth Dass Koyburto* v. *Chundee Churn Koyburto* (2) is merely an authority because it follows the rule laid down by Sir Barnes Peacock. In the case of *Karim Baksh* v. *Budha* (3) this Court merely applied the rule of English law, that is, that an ordinary member of the public could not maintain

(1) 12, W. R., *Civ. R.* 160. (2) 22 W. R. *Civ. R.*, 462.
(3) I. L. R., 1 All., 249.

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an action for the obstruction of a highway unless he has sustained some damage peculiar to himself. The rule of English law is one founded on common sense. It is that when a road is dedicated to the public, the public have only got a right to use the road for the purposes for which it has been dedicated, let it be a cart road, or a road for riding on, or a road for walking on.

I asked Mr. *Madho Prasad* who appears for the appellant whether, if in this case the defendant had built a row of houses on the site of the road, the zemíndár could not maintain his action. He was compelled to say that he could not. I asked him whether if the defendant had ploughed up the road and converted it into a grove, or a market-garden, the zemíndár could not maintain the action, and he said that he could not. The authorities which would apply in England in a case of this kind are to be found in the notes to *Dovaston* v. *Payne* (1). One of those cases is the case of *R.* v. *Pratt* (2). There are also quite recent cases which show the principle of the English law on this point. I may refer to *Rolls* v. *Vestry of St. George the Martyr, Southwark* (3), and *Goodson* v. *Richardson* (4). That the zemíndár who dedicates a road to the public does not part with his property in the soil of the road and his right to use the site of the road for any purposes he pleases on the abandonment of the road, is shown very clearly by the judgment of Mr. Justice Oldfield and my brother Mahmood in *Nehal Chand* v. *Azmat Ali Khan* (5). It appears to me that a zemíndár, like the plaintiff here, does, as a matter of fact, suffer an injury peculiar to himself when one of the public builds upon the site of the road dedicated by the zemíndár to the public. I do not put it on this ground. I put it on the wider ground that he is entitled to maintain his action, not as one of the public, but as a zemíndár for interference with his own rights of property.

I think that the appeal should be dismissed with costs.

MAHMOOD, J.—I am of the same opinion, but as it is a case which, by reason of my order of the 20th June, 1887, was remanded to the lower appellate Court, and again, by my order of the 22nd November, 1887, was referred to a Division Bench consisting

(1) 2 Smith's Leading Cases, p. 154.
(2) 4 B. and B., 300.
(3) L. R. 14, Ch. D., 785.
(4) L. R., 9 Ch. D., 221.
(5) I. L. R., 7 All., 802.

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of two Judges, I wish to give expression to my own views as to the reasons why I have arrived at the same conclusion as the learned Chief Justice.

In doing so, I do not wish to travel upon the ground on which the learned Chief Justice has done, so far as English law has a bearing upon the case.

The land to which the litigation relates admittedly, as it has been found, forms a road site within the precincts of the village which is the property of the plaintiff, and such road is used by the public for purposes of transit. There can be no doubt, as was held by me with the approval of my brother Straight in a recent case, *Ramphal Rai* v. *Raghunandan Prashad* (1), that where the only right claimed is one in common with the public, in respect of the right-of-way through a public thoroughfare, the plaintiff could not maintain an action unless he proved special damage, or (to use a more modern phrase) injury particular to himself, that is to say, over and above such injury as is sustained by him in common with the public at large. In that case the plaintiff was not the zemindár of the village but a lessee from him, and the obstruction which he sought to remove was, as a matter of fact, found to have been antecedent to the time when he obtained the lease, and my brother Straight and I held that, whilst there was nothing to show that the plaintiff's lessor had any right to the land to which the litigation related, the lease itself was also silent in respect of giving any right to the plaintiff lessee, to maintain any action in respect of encroachments on the land. I refer to that case in order to guard myself against being understood as laying down any rule of law in this case which would be in conflict with what I laid down in the case to which I have just referred.

Now I confess that I have long entertained serious doubts whether the rule of the English law of torts which in cases of obstructions of a public way requires proof of special damage, as a condition precedent to the maintaining of an action such as this, is a rule of law in itself justifiable upon juristic grounds, or adopted to the conditions of life in British India, but in the course of my own judgment in the case to which I have referred, I have adopted

(1) *Ante* 498.

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the rule of English law out of deference to the rulings which I I cited in that case.

That case however, is distinguishable from the present upon the point to which the learned Chief Justice has referred, namely, that here the *status* of the plaintiff is not merely that of an ordinary member of the public entitled to pass through the road, but the plaintiff is admittedly the zemíndár of the village and, as such, the owner of the land whereon lies the road. I think that in a case of this kind the *status* of the plaintiff would be higher than that of an ordinary member of the public, provided he has a subsisting right of ownership pure and simple, or what I may analogically call, a right of reversion to the land used as a public road. That the land is within the four corners of the mahál is admitted on all hands, and that of the mahál the plaintiff is the owner is also admitted, and all that has been found against him is that the land is used for purposes of a public way. I think, as the learned Chief Justice has pointed out, the position of a person holding such a right is to be distinguished from that of an ordinary passer-by or traveller; that even adopting the strict rule of English law as to proof of special damage being necessary in the case of an ordinary passer-by, such a rule would not apply to the case of a person such as the present plaintiff. The reasons for this distinction are, of course, clear, namely, that so long as the strip of land called the public road in this litigation forms part of the mahál, it may at some time or other cease to be a public way, or, by reason of such other changes as time or the administration of the revenue authorities might bring about, may be cultivated again, and, as such, it would no doubt come back to the zemíndár, namely, the plaintiff. It is, therefore, scarcely possible to say that, with rights, such as the plaintiff has in the land, he did not suffer any particular injury by reason of the trespass of which he complained in the suit.

In this view the road, though available to the public for purposes of transit, forms part and parcel of the mahál, but this view is hampered by the *ratio decidendi* adopted in more than one case by this Court. These cases were referred to in my judgment in the Full Bench case of *Niamat Ali* v. *Asmat Bibi* (1). One of those

(1) I. L. R., 7 All., 626.

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cases was the case of *Sahib Ram* v. *Kishen Singh* (1), where the majority of the Court held that the portion of the *abadi* or populated area of the village did not form part of the rights of a co-sharer, and the other case was that of *Hazari Lal* v. *Ugrah Rai* (2) in which it was held that *sir* land did not form an essential part of the zemíndári share of a co-sharer. Both these rulings, however, proceed upon a *ratio decidendi* which, as Pandit *Ajudhia Nath* has, I think, rightly pointed out, was practically overruled by the whole Court in *Niamat Ali* v. *Asmat Bibi* (3) to which I have referred, because there the Court held that grove-land does form part of the zemíndári rights. Here the road formed part of the zemíndári rights of the plaintiff, and his interest in such land was the right and possibility of making the land available to him for agricultural or other purposes, and his *status* is higher than that of an ordinary person maintaining an action with regard to what would otherwise be a public nuisance. So far as the plaintiff is concerned it is not merely a public nuisance, for he has suffered special injury.

For those reasons I concur in the order made by the learned Chief Justice.

Appeal dismissed.

MATRIMONIAL JURISDICTION.

1888
June 16.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

CULLEY (PLAINTIFF) v. CULLEY AND OTHERS (DEFENDANTS).*

Suit for dissolution of marriage—Decree made by District Judge—Confirmation by High Court—Application by petitioner and respondent that decree should not be made absolute—Act IV of 1869 *(The Indian Divorce Act), ss.* 16, 17.

In a suit for divorce by the husband as petitioner against his wife and another person as co-respondent, the Court of the Judicial Commissioner of Oudh, where the suit was instituted, passed a decree *nisi*, and the record of the case was forwarded to the High Court for confirmation under s. 17 of the Indian Divorce Act. The petitioner and the respondent, his wife, also forwarded to the High Court through the Registrar of the Court of the Judicial Commissioner a petition in which they expressed their intention of living together as man and wife and asked the Court not to make the decree absolute. On the 2nd June, the case came before the Court, when an order

* Case for confirmation under s. 17 of the Indian Divorce Act (IV of 1869) of a decree *nisi* passed by the Judicial Commissioner of Oudh, dated 1st December, 1887.

(1) Weekly Notes, 1882, p. 192. (2) Weekly Notes, 1884, p. 103.
(3) I. L. R., 7 All., 626.

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was passed that it should stand over for a fortnight to enable the petitioners to appear in person or by pleader. At the adjourned hearing both the petitioner and the respondent were represented by one vakil, and he prayed the Court not to make the decree *nisi* absolute.

Held, by Edge, C. J., and Brodhurst, J., that the Court should accede to the prayer of the petition and not make absolute the decree passed by the Judicial Commissioner of Oudh.

Further, that a suit for a divorce is to be dealt with like all other cases between private litigants, and therefore the High Court should not make a decree *nisi* absolute without a motion being made to it to that effect.

Held, by Mahmood, J., that proceedings in a Divorce Court are quasi-criminal, and that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties.

Held, further, that as in the Indian Divorce Act no express power is given to the parties to the suit to prevent a decree *nisi* passed in it by the District Judge from being made absolute, the principles of the practice of the English Divorce Act in such a matter might well be followed and an order be made at the desire of both parties staying the proceedings in the cause and not setting aside the decree *nisi* which cannot be done. *Lewis v. Lewis* (1) referred to.

THE facts of this case are stated in the judgment of the Court.

Pandit *Sunder Lal*, for the petitioner, and the respondent.

EDGE, C. J.—In this case the petitioner Ernest Augustus Culley, brought this suit in the Court of the Judicial Commissioner of Oudh against his wife Elizabeth Anne Culley, who was the respondent, and two men as co-respondents. The petitioner, on the 1st December, 1887, obtained from the Judicial Commissioner a decree *nisi* and a decree for Rs. 100 damages against one of the co-respondents. The record was forwarded to this Court, this being the Court which has jurisdiction to make the decree absolute. The second of June of this year was the date fixed for the hearing of the application to make the decree absolute, that date being more than six months from the date of the decree *nisi*. The petitioner and the respondent forwarded through the Registrar of the Court of the Judicial Commissioner to this Court a joint petition in which they expressed their intention of living together again as man and wife and asked this Court not to make the decree absolute. The case came on before us on 2nd June, when we passed an order that the case should stand over for fourteen days to enable the petitioner

(1) 30, L. J. P., and M. 199.

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to appear in person or by pleader. A telegram had been received which purports to come from the petitioner which stated that he intended to appear by a pleader out of respect to the Court. This morning, on the case being called on, Pandit *Sunder Lal* appeared for the petitioner and for the respondent, and on their behalf asked us not to make the decree *nisi absolute*. I would have had no difficulty as to the course to be pursued if it had not been for a doubt entertained by one of my brothers on the Bench. In my opinion, we should deal with this as with all other cases between private litigants, and this Court should not go out of its way and uninvited pass a decree without any motion being made to this Court. In fact, here the two parties who are the persons most interested in the matter, namely, the husband and wife, ask us, by holding our hand, not to dissolve the marriage which they are willing should continue. I cannot understand why they should be in a worse position by appearing before us with such a request than they would have been if they had gone on and cohabited after the passing of the decree *nisi* and brought that fact to the notice of the Court. The decree *nisi* does not dissolve the marriage till the decree has been made absolute, and, indeed, not until the time has elapsed for an appeal to the Privy Council, or, in the case of an appeal, until it has been decided, and until then the parties continue to be for all purposes man and wife. For instance, if the petitioner or respondent in this case, before the marriage was actually dissolved, should marry another person, he or she would be liable to be convicted of bigamy. If they came together after the decree *nisi* and cohabited before the marriage was absolutely dissolved, the petitioner, by cohabiting with the respondent, would, in my opinion, condone the adultery which was the basis of the decree *nisi*. It has been suggested that it is our duty to go on and consider the case on the merits, that is, on the evidence on the record of the Court below, and if satisfied with that evidence, to make the decree *nisi* absolute. That is, that although the wife has repented, and although the husband is willing to condone the adulterous acts of his wife and to take her back to live with him, we, as a Court of Justice, are bound, contrary to the wishes of the parties, to pass a decree dissolving the marriage between the parties, who are willing that the marriage state should continue. Reference has been

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made to capital cases in which the Court has to consider even in the absence of the parties whether the capital conviction should be confirmed and the capital sentence carried out. That provision as to the confirming by the Court of capital convictions is one which has been made by statute for the protection of the subject as against the Crown. I cannot see how the duties of the Court in criminal cases can throw any light on the duties of the Court in civil actions "*inter partes*." References have been made to the Ajmere Act with which I am not familiar. I understand from what has passed here that it is an Act which enables the judicial authorities in Ajmere to invoke the assistance of this Court on questions of law which may arise before it. Similar powers are given to the Judges of Small Cause Courts. In the Ajmere Act it is expressly provided that the parties need not appear. I assume the person who framed the Act thought there was a necessity for that provision. Even if these words were in the Act or not, I fail to see how the duties of the Court under the Ajmere Act references, Small Cause Court Act references, and references under the Stamp Act can apply. The object of those references is that this Court, as the highest judicial authority in these Provinces, should, when called on, assist those holding judicial offices in Ajmere or these Provinces by expressing the opinion of this Court when a difficulty arises. In looking at the Divorce Act, I find that by s. 16, in a case in which a High Court has itself passed a decree *nisi*, it provides that the High Court shall fix a time after the expiry of which the decree absolute may be made, and it is expressly provided that, if the petitioner does not apply within a reasonable time to make the decree absolute, the High Court may dismiss his suit. It would certainly be complimentary to the Courts of the District Judges, and hardly so to the High Court, to hold that in a case of a decree *nisi* having been passed by the High Court, the petitioner would have to make an application to make his decree absolute, whilst if he had gone to the District Court and got a decree *nisi*, he need take no further trouble, as the High Court, if merits appeared on the record, would be bound to make his decree absolute. I have no doubt but that we ought to accede to this application, and that it is an application which in the interests of justice and morals we should accede to. Suppose we make the decree absolute, what would be the effect

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after the time had expired for presenting an appeal to the Privy Council? The parties having ceased to be man and wife could go next day and be re-married. In the meantime by passing a decree absolute here, we would be keeping these parties in suspense, and effect in the end no possible object, except that for a short time these persons, who wish to continue as man and wife, would cease to be man and wife. In my opinion, the only order we should pass is that we do not make absolute the decree of the 1st December, 1887.

BRODHURST, J.—I entirely concur.

MAHMOOD, J.—As the learned Chief Justice has referred in his judgment to certain difficulties which I suggested in the course of the argument of the learned Pandit, who appears on behalf of both the petitioner and the respondent, I must confess that, without concurring in all that has fallen from his lordship, as to the nature of a decree *nisi* in a divorce case and the rules applicable thereto, I am willing to adopt the conclusion at which he has arrived as to the order to be passed in this case. I am glad to be able to concur in that order, as it seems to me to be consistent with the general principles upon which the law of marriage should proceed. But since it was owing to my doubts that the learned Pandit had to be heard in support of the application of the 28th May, 1888, whereby the petitioner Ernest Augustus Culley and his wife Elizabeth Anne Culley, respondent, jointly pray that the decree *nisi* of the 1st December, 1887, be not confirmed, I am anxious to explain the difficulties of law which I have felt in the case, though I have out of deference to the learned Chief Justice and my brother Brodhurst concurred in the order which they have made.

This case is governed by the Indian Divorce Act (IV of 1869), and s. 7 of that enactment expressly lays down that so far as possible the Courts shall "in all suits and proceedings hereunder act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being, acts and gives relief." This being so, the principles of the English law of marriage and divorce cannot be lost sight of in such cases, and so far as I know those princi-

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ples, I have no hesitation in saying that, because that law does not recognise marriage as a simple civil contract, as some other systems take it to be, therefore proceedings in the Divorce Court cannot be regarded as an ordinary civil litigation wherein private rights only are concerned, and wherein it rests with the parties to deal with their rights as they like by mutual consent or otherwise. For instance, a litigation such as this which aimed at dissolution of a valid marriage is not dependent for its results on the wishes of either the husband or the wife, nor can a decree for dissolution of marriage be passed even if the co-respondent agrees with the husband and the wife that such should be the case. The notions of the English Ecclesiastical law are the foundation of this rule, and not only has that rule been adhered to by the Court in England ever since dissolution of marriage (that is, divorce *a vinculo*) was made lawful in that country, but express provisions for the intervention of third parties have been made by the English legislature, and the principles of that legislation have in the main been imported into this country by the Indian Divorce Act which governs this case. In England, not only any person may intervene in a divorce suit, but the Queen's Proctor, an especial officer appointed for the purpose, has especial duties assigned to him for intervention in such litigation in order to prevent the parties from securing by mutual consent or otherwise such results as would be opposed to the English law of marriage and divorce. That the same principles are recognised by the Indian Divorce Act seems to me to be apparent from the provisions of s. 12 and the second paragraph of s. 16 of the same enactment, and the rest of the Act is consistent with this interpretation.

Now it being an undoubted proposition of the English law of divorce and of the Indian Divorce Act that the mutual consent of the parties to a litigation which aims at obtaining a decree *nisi* cannot by dint of such mutual agreement or compromise secure such a decree, it occurred to me as a difficult question, whether in a converse case the mutual consent of the parties can undo the effects of a decree *nisi* which one of them has already obtained. In other words, I entertain serious doubts whether such a decree can be nullified by consent of the parties to such a decree.

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To this question no express answer is furnished by the Indian Divorce Act. S. 16 of the enactment provides that every decree for dissolution of marriage shall be in the first instance a decree *nisi*, not to be made absolute till after the expiration of six months or more, within which period any person may intervene in the cause, and the section goes on to provide *inter alia* that "whenever a decree *nisi* has been made, and the petitioner fails within a reasonable time to move to have such a decree made absolute, the High Court may dismiss the suit." This last provision no doubt supports the view that a petitioner who has obtained a decree *nisi* might by inaction prevent that decree from being made absolute, the result of which might be the dismissal of the suit. But it must in the first place be remembered that the provision of the law in this behalf is not imperative, and in the next place that it is easy to conceive cases in which the Court would in the exercise of its discretion be justified in making the decree absolute, notwithstanding the absence of any motion on behalf of the petitioner to obtain that result. There are, I believe, English cases to support this view, but I consider it unnecessary to pursue the subject further, because under the Indian Divorce Act, the provision which I have quoted is limited to decrees *nisi* passed by the High Court.

That that provision is not applicable to decrees *nisi* passed by District Judges is clear from the terms of s. 17 of the Act, in which no such provision as that I have quoted finds place, and the distinction is all the more noticeable because the last part of the section contains provisions for intervention of third persons, "during the progress of the suit in the Court of the District Judge," whilst the provisions of the second paragraph of s. 16, applicable to decrees *nisi* passed by the High Court, prescribe the period of intervention to be the interval between the date of the decree *nisi* and the date of its being made absolute. What the exact reasons for this distinction may be it is unnecessary for me to contemplate, for I must take the law as it stands, and interpreting it by well recognised rules of construing statutes, I cannot but hold that the effect of the enactment is, that whilst in the case of decrees *nisi* passed by a High Court the power of intervention may be exercised after passing of the decree *nisi*, and the suit for dissolution of marriage itself possibly defeated by reason of the successful petitioner not moving to

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have the decree made absolute, no such provisions exist in respect of decrees *nisi* passed by District Judge, and that in lieu thereof power is given by the last part of s. 17 to intervene "during the progress of the suit in the Court of the District Judge;" and that that power does not exist after the District Judge has passed a decree *nisi* for dissolution of marriage. I have therefore no doubt that our Indian Divorce Act confers no power of intervention in respect of decrees *nisi* passed by a District Judge *after* such decree has been passed; nor can such decree *nisi* be set aside or the suit dismissed merely because the holder of the decree does not move this Court to have the decree made absolute.

I have mentioned this in order to show why during the course of the argument of the learned Pandit I was unable to accept the contention that any provisions of s. 16 of the Act relating to decrees *nisi* passed by High Courts, are to be imported into s. 17 which relates to decrees *nisi* passed by District Judges; for if I could accept the contention, there is no reason why the provisions of s. 17 should not be imported into s. 16, and thus the two sections, being mixed up into one, present inconsistency of statutory provisions in one and the same statute. I am inclined to think that cases which come up to this Court under s. 17 of the Act for confirmation of decrees *nisi* are in the nature of references, which must be disposed of whether the parties appear before the Court or not, for whatever order the High Court may make in the case, there is no such provision as that contained in s. 16, enabling the Court to dismiss the petitioner's suit merely upon the ground that the party interested fails to appear when the case comes on for hearing for confirmation of a decree *nisi* passed by a District Judge. The distinction which exists in this respect lends support to this interpretation, and I cannot help holding that we should have been bound to dispose of the case even if the petitioner had never appeared before us. This view is consistent with the principle upon which many other provisions of the Indian statute-book, to some of which the learned Chief Justice has referred, proceed in respect of references made to the High Court, such references being often from remote districts.

In this case, however, no such question directly arises, because two of the parties to the District Judge's decree *nisi* have appeared,

though somewhat anomalously by one and the same pleader, and I have referred to the possible effects of the absence of the parties only because it was suggested in the course of the argument that it was entirely within the choice of the parties whether or not the decree *nisi* should be made absolute by our confirming it. I have already said enough to show that proceedings in a Divorce Court are *quasi*-criminal, that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties; and the distinction is fully recognised by the English law.—Browne on Divorce and Matrimonial Causes, 3rd *Ed.* p. 218.

Is there then any power in the Court to set aside a decree *nisi* by any procedure other than that of intervention by a third party? The English Divorce Court [*vide Stoate* v. *Stoate*, (1)] and the Indian Court [*vide Willis* v. *Willis*, (2)] are agreed that the right of intervention is limited to persons other than the parties to the decree, and I have already shown that under the Indian Divorce Act such right of intervention is limited to the period of "the progress of the suit in the Court of the District Judge," that is, before the decree *nisi* is passed, and does not exist thereafter. Is there then any other power in the parties to prevent a District Judge's decree *nisi* from being confirmed by this Court under s. 17 of the Divorce Act, either by compromise or otherwise?

This is the direct question in the case, and it is one which is far from being free from doubt and difficulty. Here the husband and wife in their joint application to this Court state "that your petitioners subsequent to the passing of the decree *nisi* in the above suit have come to terms, and have resolved that on the petitioner leaving the military service two years hence or thereabouts they will live together again as man and wife, and have arranged that meantime the respondent shall go to England, there to remain with the petitioner's father and mother," and it is upon this ground that they pray that the District Judge's decree *nisi* of the 1st December, 1887, be not confirmed.

It will be observed that in this statement there is no allegation that the parties had already resumed co-habitation, or that there

(1) 30 L. J. P. and M. 173. (2) 4 B. L. R., O. C. 52.

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had been any kind of condonation by the petitioner who had obtained the decree *nisi* from the District Judge on the 1st December, 1887. The recital in the petition amounts to nothing more than the expression of a deliberate intention on the part of the husband and wife to co-habit after the lapse of two years if certain conditions were fulfilled.

Is such an application entertainable under the Indian Divorce Act, as a reason for not confirming the District Judge's decree *nisi* of the 1st December, 1887? Pandit *Sunder Lal* has argued that under s. 45 of the Act all the rules of the Code of Civil Procedure are rendered applicable to proceedings of this nature, and that the provisions of s. 375 of that Code entitle the parties to enter into any compromise as to the final adjudication of this Court in respect of the District Judge's decree *nisi* of the 1st December, 1887.

I am of opinion that this contention is entirely unsound, because in the first place the terms of s. 45 of the Indian Divorce Act itself render the application of the Civil Procedure Code subject to the provisions of the Divorce Act, and in the next place the very nature of the provisions of s. 375 of the Code militates against the very nature of proceedings in the Divorce Court as I have already shown. That section therefore has no application to this case, for it furnishes no guide in respect of matrimonial causes. We have, therefore, to fall back upon the provisions of the Indian Divorce Act itself in deciding whether the application now made can be granted. But as I have already said that Act contains no express provisions upon the subject, beyond the general provisions of s. 7 of that enactment requiring us to act on principles of the practice of the English Divorce Court.

This being so, I think the case of *Lewis* v. *Lewis* (1) furnishes a state of things closely similar to the facts of this case, and I may quote from the judgment of Sir C. Cresswell in that case to indicate its application to this case. The learned Judge Ordinary, after stating that the petitioner being entitled to a dissolution of her marriage, a decree *nisi* was pronounced, and when the motion to make it absolute came on, the husband interposed and stated that he and his wife had *made up their differences* and had *renewed matri-*

(1) 30 L. J., P. and M., 199.

monial cohabitation, and therefore applied to have the petition dismissed, and it appeared from an affidavit of the clerk of the petitioner's attorney that she did not desire to take any further proceedings in the matter, went on to say :—"I doubt much whether after a decree *nisi* has been pronounced I can dismiss the petition at the instance of either of the parties to the suit; but if the petitioner either by her attorney or in person applies to the Court, I will at the desire of both parties make an order that no further proceedings be taken in the cause. All proceedings in the case will then be stayed. I doubt whether the Court has power to dismiss a petition for dissolution of marriage after a decree *nisi* has been pronounced, except in the manner pointed out by the 23 and 24 Vic, C. 144, s. 7, namely, at the instance of the Queen's Proctor or of a third person."

This case is to my mind an authority for the proposition that even cohabitation of the husband and wife after one of them has obtained a decree *nisi* for dissolution of marriage will not *ipso facto* nullify such decree, and that, even where the husband and wife (that is, petitioner and respondent) agree, such decree cannot be set aside, and that all that their mutual agreement can achieve is that further proceedings in the cause would be stayed.

The English law of marriage and divorce, as reproduced in the Indian Divorce Act, has placed the matrimonial contract upon a footing so vastly different to that upon which ordinary civil contracts are placed, that it would be wrong to say that only private rights of the parties concerned in a matrimonial dispute are involved in the litigation which arises out of those disputes, or that the law as it stands leaves it open to the parties to settle such disputes by mutual agreement or compromise. The legislature itself has recognised the distinctions in passing the Indian Divorce Act, and it was because of those distinctions that I felt the difficulties which I have mentioned and which rendered it necessary for Pandit *Sunder Lal* to occupy the time of the Court in supporting the joint application of the husband and wife to prevent the decree *nisi* being confirmed by us.

But though these difficulties have occurred to me, the liberal interpretation which the learned Chief Justice has put upon the

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Indian Divorce Act is so consistent with the general principles upon which the matrimonial law in civilized countries should proceed that I have willingly adopted the order which he has made. That order, as I understand it, is that we should desist from confirming the decree *nisi* and prevent it from being made absolute under the peculiar circumstances of this case. I do not understand the order to set aside the decree *nisi*; and I may respectfully add that if I had not so understood it I should probably have been unable to concur in it. As the order has been made its practical effect is virtually the same as that indicated by Sir C. Cresswell in *Lewis* v. *Lewis* (1), that is to say, staying further proceedings relative to the confirmation of the District Judge's decree *nisi* of the 1st December, 1887, by our not confirming it.

NOTE—As to whether or not an application for a decree absolute according to the practice in the English Divorce Court, is a step in the cause, see Ousey and Ousey v. Atkinson, L. R. 1 P. Div. 56 and Brown, on the Law and Practice in Divorce and Matrimonial Causes, 4th Ed., p. 325.

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June 21.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

KUDHAI (DEFENDANT) *v.* SHEO DAYAL AND OTHERS (PLAINTIFFS).*

Execution of decree—Joint decree—Decree for possession of immoveable property—Purchase by judgment-debtor of rights of some of the joint decree-holders—Decree extinguished pro-tanto—Validity of sale and extent of rights purchased to be determined by Court executing the decree—Civil Procedure Code, s. 244 (c).

Where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer the decree does not become incapable of execution, but is extinguished only *pro-tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property.

The rule of law against breaking up the integrity of a mortgage security is a rule aiming at the protection of the mortgagee, and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property.

Disputes as to the legality of the purchase by judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates and the extent of the share acquired under the purchase are questions falling within the purview of clause

* Second Appeal No. 961 of 1887 from a decree of A. Sells, Esq., District Judge of Meerut, dated the 19th March, 1887, reversing a decree of Maulvi Jaffar Hussain, Munsif of Meerut, dated the 11th January, 1887.

(1) 30 L. J., P. and M. 199.

(a) of s. 244 of the Code of Civil Procedure and must be determined by order of the Court executing the decree.

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Banarsi Das v. *Maharani Kuar* (1), *Wise* v. *Abdool Ali* (2) and *Pogose* v. *Fukuroodeen Mahomed Ahsan* (3) referred to.

The facts of this case are stated in the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Babu *Jogindro Nath Chaudri*, for the respondents.

MAHMOOD, J.—The facts of this case may be recapitulated here to indicate the questions of law which require decision in this appeal.

On the 13th June, 1882, six persons, *viz.*, (1) Musammat Premu, (2) Debi Sahai, (3) Girdhari, (4) Chand Lal, (5) Bihari, and (6) Kudhai (appellant), obtained a joint decree for possession of a house by redemption on payment of Rs. 1,043-2-0 against three persons (1) Sheo Dayal, (2) Sheo Singh, and (3) Johri Mal.

On the 5th June, 1885, Kodhai by himself applied for execution of the decree, praying for possession of only half of the house, which he claimed as his share therein. To this application objections were raised by the judgment-debtors, and during the pendency of that application the Court executing the decree allowed him to amend his application so as to seek possession of the entire house.

On the 28th August, 1885, the Court allowed Kudhai, appellant, to execute the decree in respect of the whole house on furnishing security for Rs. 869-2-8 (which represented five-sixths of the mortgage-money) to protect the interests of the other decree-holders who had not joined in the application for execution. The order was reversed in appeal by the lower appellate Court, but was restored by this Court on the 20th May, 1886 (4).

Having so far succeeded, Kudhai, appellant, having filed the requisite security applied again for execution of the decree in respect of the whole house, by an application dated 13th September, 1886, which must be taken to revive the execution proceeding commenced by him with the application of the 5th June, 1885.

Meanwhile, on the 2nd August, 1882, Musammat Premu and others who were joint decree-holders with Kudhai, sold their rights

(1) I. L. R., 5 All., 27.
(2) 7, W. R., 130.
(3) 25, W. R., 343.
(4) Weekly Notes, 1886, p. 125.

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to one Sugan Chand, who on the 21st September, 1886, sold those rights to the judgment-debtors, that is to say, to the persons who were already in possession of the house. Relying upon their purchase the judgment-debtors raised objections to the execution, contending that the rights of the decree-holder Kudhai who sought execution, in respect of the whole house, were limited to a one-fifth share, and that he could not, therefore, seek possession of more than that share. On the other hand, the appellant Kudhai, decree-holder, contended that the extent of his share was at least one-half of the whole house, and that he could execute the decree in respect of the whole house as the purchase made by the judgment-debtors was illegal, and the question had already been settled as to his right to execute the whole decree.

The Court of first instance held that the purchase made by the judgment-debtors having been made subsequent to the High Court's order of the 20th May, 1886, such purchase could not nullify the effect of that order; that the judgment-debtors are bound by that order, "and should give possession to Kudhai of the whole house"; that the question as to the extent of Kudhai's share in the house could not be determined in execution proceedings; and that "the judgment-debtors may obtain their remedy as to the determination of their shares in the house and as to the possession thereof as representatives of Premu, &c., decree-holders, by a regular suit in the same manner as their predecessors in title would have done." Upon these grounds the first Court rejected the objections of the judgment-debtors, and allowed execution to proceed in respect of the whole house.

From that order the judgment-debtors appealed to the lower appellate Court, and the learned Judge of that Court reversed the order of the first Court in a judgment which goes to show that he regarded the share of the decree-holder Kudhai to be only one-fifth in the house, though the order passed in appeal does not show that the learned Judge allowed execution of decree even to that extent.

From the order of the lower appellate Court this second appeal has been preferred, and the arguments addressed to me by the

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learned pleaders for the parties raise the following questions for determination :—

(1). Whether the purchase by the judgment-debtors of the shares of their decree-holders, Musammat Premu and others, renders the decree of the 13th June, 1882, incapable of execution in respect of the whole house, notwithstanding the order of this Court dated the 20th May, 1886, which restored the first Court's order of the 28th August, 1885, allowing execution in respect of the whole house.

(2). Whether the question as to the legality of the purchase by the judgment-debtors and the extent of the share which they so acquired can form the subject of investigation in execution proceedings such as this case.

I am of opinion that the questions so raised are not free from difficulty, principally because the Code of Civil Procedure contains no express provision to meet cases such as this. The questions, however, are not dissimilar in principle from those which arose in the case of *Banarsi Das* v. *Maharani Kuar* (1), where my brother Straight and I concurred in holding that when by operation of law one of several joint judgment-debtors acquires the position of decree-holder in respect of the whole judgment-debt, the effect is to extinguish the liability of the other judgment-debtors, and the decree cannot be executed against them, but that when one of them so acquires only a partial interest in the decree, the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has so acquired. That was a case in which the decree was for money, but in arriving at the principle upon which that judgment proceeded we relied upon the case of *Wise* v. *Abdool Ali* (2), where Loch and Macpherson, JJ., held that "even if it should appear that the principal defendant has (as one of the representatives of his son) an interest as one of the decree-holders that fact will not bar execution being issued by other decree-holders according to *such rights as they may be able to prove.*" Similarly, reference was made to the case of *Pogose* v. *Fukurooddeen Mahomed Ahsan* (3), where Jackson and McDonell, JJ., observed:—"We

(1) I. L. R., 5 All., 27. (2) 7, W. R., 130.
(3) 25, W. R., 343.

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considered for a moment whether it was possible to make any distinction between the capacity in which Azim Chaudhri was the judgment-debtor and that in which he became one of the decree-holders as representing his deceased wife; but it appears to us that the consequence as regards that share in the decree is the same as it would have been if he *had purchased the whole or a part*. We think the effect of inheritance as to a part or as to the whole is the extinction of the decree *pro-tanto*."

In both these cases, though the reports are not very clear, it would appear that the decrees were for immoveable property, and the rights of one of the decree-holders had during the pendency of execution proceedings devolved upon the judgment-debtor; and in the latter case Sir Louis Jackson, in delivering the judgment of the Court, expressly stated that the effect of such devolution was similar to that of a purchase by the judgment-debtor of a portion of the property in respect of which the decree had been obtained.

I am of opinion that these two rulings are applicable in principle to this case, and are in accord with the juristic reasons upon which my judgment in the case of *Banarsi Das* v. *Maharani Kuar* (1) proceeded. The general effect of these rulings seems to me to be that where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro-tanto*. The theory of law upon which this rule proceeds is, in my opinion, sufficiently general to comprehend alike, cases in which the decree is for money and cases in which the decree awards possession of immoveable property. For instance, in a case where A and B jointly obtain a decree for money against C, and C as judgment-debtor either pays off the share of A, or purchases his share in the decree, or inherits such share from A, the result would be the extinguishment of the decree *pro-tanto*, and the remaining decree-holder B could not execute for more than his own share. This is the effect of the ruling in *Banarsi Das* v. *Maharani Kuar* (1), and the cases to which the ruling refers. Similarly, and on the same principle, I hold that where A and B obtain a decree

(1) I. L. R., 5 All., 27.

for possession of a house or other immoveable property against C, and C purchases or inherits the rights and interests of A in such property, the decree is extinguished *pro-tanto*, though the remaining decree-holder B can, of course, execute the decree in respect of his own share. Both classes of cases rest upon the common principle of jurisprudence that a person cannot at one and the same time unite in himself two opposite characters. For instance, a person cannot be his own creditor, or the mortgagee of his own rights, and it is upon this principle that the doctrine of merger and what would in Roman law be called *confusio* proceed.

Applying these principles to this case, I am of opinion that if the defendants-mortgagees judgment-debtors of the decree of the 13th June, 1882, have validly acquired by purchase the rights and interests of the mortgagors decree-holders Musammat Premu and others, the decree cannot, to that extent, be executed against them, because it has been extinguished *pro-tanto*, and all that Kudhai, decree-holder, appellant, could seek to recover possession of by enforcement of the decree would be such share in the mortgaged house as has not been validly purchased by the mortgagees judgment-debtors. This view does not, in any way, affect this Court's order of the 20th May, 1886, because at that time the judgment-debtors respondents had not acquired the rights of ownership in the house and were not in a position to raise the pleas which they have now set up. As already stated, Kudhai's joint decree-holders Musammat Premu and others sold their share in the mortgaged house to Sugan Chand on the 2nd August, 1882, but neither the vendors nor Sugan Chand were parties to the litigation which ended in this Court's order of the 20th May, 1886. The effect of that order no doubt is to allow Kudhai to execute the decree of the 13th June, 1882, in respect of the whole house, but at that time the judgment-debtors had not purchased a portion of the house from Sugan Chand, for the sale is dated the 21st September, 1886, and it is upon the grounds of that purchase that the plea they now raise is founded.

For these reasons I hold that the decree-holder appellant Kudhai, is entitled to execute the decree only in respect of so much of the house as has not been validly purchased by the judgment-debtors-respondents under the sale of the 21st September, 1886.

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These judgment-debtors are mortgagees in possession, and the decree of the 13th June, 1882, is a decree for redemption; and it seems to me obvious that it would be a most circuitous method to force these judgment-debtors mortgagors to receive in these execution proceedings the entire mortgage money including so much as is due by the shares which they themselves have purchased, and then to relegate them to another regular suit in which they would seek redemption of their shares from Kudhai on payment of the very money which Kudhai had paid to them in these execution proceedings. The rule of law against breaking up the integrity of a mortgage security is a rule aiming at protection of the mortgagee, but that rule does not apply to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. This rule, which has always been recognised in India, has been formulated in the last part of s. 60 of the Transfer of Property Act (IV of 1882), and although it is a rule of substantive law, the principle upon which it proceeds is, in my opinion, applicable also to adjective law, that is, rules of procedure such as those relating to execution of decrees of this character.

These observations dispose of the first question in this case as enunciated by me, and they render the decision of the second question an easy matter. The whole of that question comes to this, is the dispute as to the legality of the purchase by the judgment-debtors and the extent of the share which they so purchased a matter falling within the purview of clause (*c*) of s. 244 of the Code of Civil Procedure? That section, in enumerating the questions to be decided by the Court executing the decree, goes on to say in cl. (*c*), "any questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree." Here the decree-holder appellant, Kudhai, as also the judgment-debtors respondents were parties to the suit which ended in the decree of 13th June, 1882, and which decree is sought to be executed in these proceedings, and this being so, I hold that the terms of cl. (*c*) of s. 244 of the Code of Civil Procedure are sufficiently wide to include such questions as those raised in this case, relating to the validity and extent of the share purchased by the judgment-debtors in the mortgaged house to which the decree relates.

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But in this case neither of the Courts below has tried the case upon the merits, with reference to the question how far the decree sought to be executed has been extinguished by reason of the purchase made by the judgment-debtors-respondents on the 21st September, 1886, and till that question is decided upon the merits, it is not possible to determine to what extent the decree can be executed by Kudhai, and what amount he should pay in order to secure possession of so much of the house as has not been purchased by the mortgagees judgment-debtors respondents. And in this connection I may state that the fifth ground of appeal before me, which proceeds upon the assumption that the decree-holder Kudhai appellant had already paid the mortgage-money as provided by the decree, is also a matter relating to the merits and cannot be dealt with by this Court as a Court of second appeal.

Under these circumstances, the proper course is to decree this appeal, setting aside the order of both the Courts below and to remand the case to the Court of first instance for disposal upon the merits, with reference to the observations which I have made. I order accordingly. Costs will abide the result.

Cause remanded.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

1888
June 23.

DEBI PRASAD (PLAINTIFF) *v.* RUP RAM AND OTHERS (DEFENDANTS).*

Act XXII of 1881 (*Excise Act*), *ss.* 5, 12, 35, 42—*License—Sub-lease—Breach of conditions of license—Consideration forbidden by law—Immoral consideration—Consideration opposed to public policy—Act IX of* 1872 (*Contract Act*), *s.* 23.

The plaintiff obtained from the excise authorities a license to manufacture and sell country liquor, such license containing a condition against sub-letting the benefits of the license. By s. 42 of the Excise Act (XXII of 1881) the violation of any condition of a license granted under the Act is made a punishable offence. The plaintiff sub-let the license to defendants who on the 5th of September, 1884, executed an agreement to pay to the plaintiff a certain sum of money, in which was included the sum of Rs. 1,500, which the defendants had undertaken to pay to plaintiff as rent reserved on the sub-lease. The plaintiff instituted the suit for recovery of the amount due to him on the agreement and it was decreed by the Court of first instance but dismissed by the lower appellate Court.

* Second Appeal No. 83 of 1887, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 6th November, 1886, reversing a decree of Maulvi Shah Ahmad-ulla Khan, Subordinate Judge of Gorakhpur, dated the 15th March, 1886.

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On second appeal the plaintiff contended on the authority of *Gauri Shankar* v. *Mumtaz Ali Khan* (1), that his suit had been wrongly dismissed.

Held, that the sub-letting of license to manufacture and sell country liquor having been made punishable as an offence is to be deemed as an act contrary to law within the meaning of s. 23 of the Indian Contract Act (IX of 1872), and the claim to recover money due on such sub-lease was therefore not enforceable in a Court of justice.

Gauri Shankar v. *Mumtaz Ali* (1) distinguished.

THE facts of this case are stated in the judgment of the Court.

The T. Hon. *Conlan*, Maulvi *Zahur Husain* and Munshi *Lalta Prasad*, for the appellant.

Mr. J. E. *Howard* and Pandit *Sundar Lal*, for the respondents.

BRODHURST and MAHMOOD, JJ.—This was a suit for recovery of Rs. 1,043-15-1½, principal and interest, due upon a *sarkhat* (agreement) executed by the defendants on the 5th September, 1884. In that agreement is included a sum of Rs. 1,500, which the defendants promised to pay to the plaintiff as the sub-lessees of a license obtained by the plaintiff from the revenue authorities under the Excise Act for distillery. The suit was defended upon various grounds, but it was decreed by the Court of first instance.

Upon appeal the lower appellate Court reversed the decree of the first Court upon a question of law, which has to be considered by us here, as it is the main point upon which this second appeal has been preferred to us. The learned Judge of the lower appellate Court has held that the sum of Rs. 1,500 included in the *sarkhat* could not be lawfully taken into account, because it represented money due upon a contract of sub-leasing a license, which contract was opposed to the Excise Act (XXII of 1881), by s. 5 of which enactment it is only persons to whom the license has been granted who can take benefit of it, and by s. 12 of the same enactment such licensee can take advantage of the license subject to the terms of the license itself and not in contravention thereof. Again, s. 35 and the following sections provide for regulations which bind the licensee and subject the license to certain conditions, and s. 42 in general terms says that any person who breaks any rule made under the Act, or any condition of a license granted under the Act, for the breach of which rule no other penalty is herewith provided, shall be punished with a fine of Rs. 50.

(1) I. L. R., 2, All., 411.

In this case the license which had been obtained by the plaintiff in 1883, contained in para. 12 express prohibition against sub-letting the benefits of the license, and there can be no doubt that the sub-letting of the license by the plaintiff to the defendants was an action in contravention of the terms of the license above-mentioned, and was so punishable under s. 42 of the Excise Act (XXII of 1881).

We therefore hold that the sub-letting of the license was an action contrary to law within the meaning of s. 23 of the Contract Act (IX of 1872), and as such not enforceable by us as a Court of justice.

Mr. *Conlan* in arguing the case on behalf of the appellant has relied upon a Full Bench ruling of this Court in *Gauri Shankar* v. *Mumtaz Ali Khan* (1), and the learned counsel contends that that case is an authority to support the proposition that the restrictions upon sub-leasing a license are intended only for the protection of the public revenue and do not vitiate the contract entered into by a licensee with a third party. So far as that case is concerned it is enough to say that Regulation VI of 1819, upon which the case proceeded, is in many respects different, both in point of nature and policy, from the Excise Act (XXII of 1881) with which this case is concerned, and that the ruling cited is one in which there was a case of partnership, and the license did not contain any express prohibition against such partnership being entered into.

Pandit *Sundar Lal* in supporting the case for the respondents has called our attention to certain English cases—*Ritchie* v. *Smith* (2); *Cundell* v. *Dawson* (3); *Smith* v. *Mawhood* (4); *Taylor* v. *The Crowland Gas & Coke Co.* (5)—for supporting the contention that in connection with Excise Acts, the person to whom the license is given is the only person who can avail himself of such license, and that it would be defeating the policy of such enactments if such licensee is allowed to sub-lease the license by any agreement. Again, the learned pleader relies upon a ruling of the Calcutta High Court in *Judoonath Shaha* v. *Nobin Chunder Shaha* (6), where Sir Richard Couch, in dealing with the Bengal Excise Act, held that "a contract by which a licensee lets the shop and the

(1) I. L. R., 2 All., 411.
(2) 18, L. J. C. P., 9.
(3) 17, L. J. C. P., 311.
(4) 15, L. J. Exch. 149.
(5) 23, L. J. Exch. 254.
(6) 21, W. R., 289.

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use of the license for a fixed term, receiving rent, is contrary to the policy of the law, and comes within the rule that a contract which is illegal, or is contrary to public policy, cannot be enforced."

We are of opinion that the general effect of those cases and especially the last mentioned case is that no licensee under the excise laws can transfer the license or sub-lease it to any person, and that it would be defeating the policy of the law if such contracts were to be allowed. This view is based not only upon the general principle that anything which defeats statutory provisions or is against the public morals should not be allowed, but upon the especial matters of the excise law that the capacity of the licensee is a matter to be taken into account, and that the consideration of the public morals also forms part of the granting of such license with reference to the character of such licensee. We hold therefore that the lower appellate Court was right in holding that the suit, taking into account the sum of Rs. 1,500 as rent due under the license which the plaintiff had taken from the revenue authorities and sub-leased to the defendants, was not maintainable. That Court has also found that once the item of Rs. 1,500 is kept out of account nothing of the account proffered by the plaintiff himself remains due to him. This being so, we dismiss the appeal with costs.

Appeal dismissed.

1888
July 7.

CRIMINAL REVISION.

Before Mr. Justice Straight.

EMPRESS *v.* NIADAR.

Act XLV of 1860 (*Penal Code*), *s.* 498—*Detaining with criminal intent a married woman.*

The words "such woman" in s. 498 of the Indian Penal Code do not mean such a woman as has been so enticed as mentioned in that section but mean such woman whom the accused knows or has reason to believe to be the wife of any other man; the detention of such a woman with the particular intent defined in the section is one of the offences made punishable under that section.

THIS was an application for revision on behalf of Niadar, convicted under s. 498 of the Indian Penal Code.

The evidence in the case proved that the wife of the complainant ran away from him and was eventually found residing with the petitioner. Complainant claimed back his wife, but petitioner persisted

in detaining her, knowing that she was then the complainant's wife. On these facts the petitioner was convicted by a Magistrate under s. 498 of the Indian Penal Code and sentenced to rigorous imprisonment for four months. On appeal to the learned Sessions Judge, that officer observing that "it is fairly proved that the accused when complainant claimed his wife detained her, having then reason to believe she was complainant's wife," affirmed the conviction and sentence.

The second ground on which revision was sought was as follows: —"Because when enticing away a married woman is not established, no conviction can be had as against the prisoner under s. 498 of the Indian Penal Code."

Mr. *Niblett*, for the petitioner.

The *Government Pleader* (*Ram Prasad*), for the Crown.

STRAIGHT, J.—If I understand the judgment aright it has been found as a fact by the learned Judge that the petitioner, knowing or having reason to believe that the woman was the wife of the complainant, detained her in his house and kept her from her husband with the intent that she should continue to co-habit with him. It is admitted by the learned pleader for the petitioner, that his first plea as to the proof of the marriage cannot be sustained, but he contends that on the facts found by the Judge, and in the absence of proof of enticement, there can be no conviction under s. 498 of the Penal Code. In support of the view he refers to a ruling of Pearson and Oldfield, JJ. (1), which no doubt favours his contention, though whether the decision of those learned Judges is to be regarded as confined to the facts of that particular case is not altogether clear. At any rate, the point now raised does not seem to have been discussed. In my opinion, the words "such woman" in s. 498 do not mean "such woman so enticed as aforesaid," but do mean "such woman whom he knows or has reason to believe to be the wife of any other man," and that the detention of such a woman with the intent therein provided is one of the offences comprehended in the section. The petitioner therefore was, in my opinion, rightly convicted. But I think upon all the facts disclosed here a sentence of one month's simple imprisonment would have been ample, and I direct that the record be so amended.

(1) I. L. R., 4 All., p. 251.

1888
July 10.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Tyrrell.

HARI PRASAD (PETITIONER) *v.* DEBI DIAL (OPPOSITE PARTY).

Criminal Procedure Code, s. 195—*Sanction for prosecution for giving false evidence in a suit under Act XII of* 1881 *tried by an Assistant Collector of the second class—Sanction granted by Collector—Jurisdiction of Sessions Judge to entertain application to revoke sanction.*

A suit for arrears of rent under s. 93, clause (*a*), Act XII of 1881, was heard by a Tahsildar having the powers of and acting as an Assistant Collector. Application was made to him for an order sanctioning the prosecution of a witness for having given false evidence in the course of the trial of the suit. The Tahsildar referred the matter to the Magistrate of the district who was the Collector, and that officer made an order sanctioning the prosecution. From this order the witness applied to the Court of the District Judge to revoke the sanction. That Court being of opinion that the Court of the Collector was not subordinate to it in the matter within the meaning of s. 195 of the Code of Criminal Procedure, 1882, declined to interfere. The witness then applied to the Commissioner of the Division, and that officer holding that he had no jurisdiction in the matter also declined to interfere. On application by the witness to the High Court for revision of the order of the Court of the District Judge:

Held, that the Court of a Collector when granting sanction for prosecution under s. 195 of the Code of Criminal Procedure, 1882, in respect of false evidence given in the course of the trial of a rent case from the final decision in which there was no appeal to the Court of the Judge of the District, was still to be deemed subordinate to it, within the meaning of that section, and the Court of the District Judge may be taken to be the Court to which appeals from the decisions of the Collector ordinarily lie.

The facts of this case are stated in the judgment of the Court.

Pundit *Sundar Lal*, for the petitioner.

EDGE, C. J.—This is a reference by my brother Straight to this Bench now composed of my brothers Straight, Tyrrell and myself. In a suit for arrears of rent under s. 93, clause (*a*), Act XII of 1881, which was heard by a Tahsildar having the powers of and acting as an Assistant Collector of the second class, application was made to him for an order sanctioning the prosecution of a witness in the suit for perjury. The Tahsildar, thinking he had no jurisdiction, referred the matter to the Magistrate of the District, who was the Collector. The latter officer made an order sanctioning the prosecution. From that order the witness applied to the Sessions Judge to revoke the sanction. The Sessions Judge, being of opinion that the Collector was not sub-

ordinate to the Court of the Sessions Judge in this matter within the meaning of s. 195 of the Code of Criminal Procedure of 1882, declined to interfere. The witness then applied to the Commissioner of the Division. The Commissioner of the Division, being of opinion that he had no jurisdiction under s. 195 of the Code of Criminal Procedure of 1882, also declined to interfere. The witness then through counsel applied to this Court to revise the order of the Sessions Judge, the principal plea taken being that the Judge of Gorakhpur had jurisdiction to hear the application to revoke the sanction. My brother Tyrrell and I are only asked to express our opinion in the matter. It will be for my brother Straight to pass orders in the case. The question on which we are asked for an opinion is whether the Judge's Court is the Court to which appeals from the Collector's Court ordinarily lie. I have great difficulty in answering that question in the light of the provisions of the N.-W. P. Rent Act on the subject of appeals. Under that Act one set of appeals—from a Collector's *decrees* in suits—goes necessarily to the District Judge. Another class of appeals—from his *orders* made in applications—goes necessarily to the Commissioner of the Division. In either case the course of appeal may be described as ordinary: and it is difficult to say whether the Commissioner's Court or the Judge's Court is the Court to which appeals from the Collector's Court ordinarily lie. It would be inconvenient to hold that, in cases arising out of s. 195 of the Code of Criminal Procedure, the Court to which applications to set aside or to grant a sanction given or refused in the Court below should be made should have to be determined by a consideration of the question of the *forum* of appeal in the particular matter in which the perjury is alleged to have been committed. It has been suggested by my brother Tyrrell that the framers of s. 195, as amended in 1882, had in mind the normal course of appeals in a district, as provided, for example, in Act VI of 1871, rather than the appellate provisions of peculiar local or special Acts, and that for the purposes of s. 195 the Court of the Judge of the District may be taken to be the Court to which appeals from the Collector's Court ordinarily lie. I think we may come to this conclusion, but I must say that I doubt whether the framers of s. 195 of Act X of 1882 had present to their minds the difficulty or ambiguity in this respect arising out

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of the provisions of the Rent Act XII of 1881. The reference will be returned to our brother Straight with our opinion thereon.

STRAIGHT, J.—I agree.

TYRRELL, J.—I agree. It was held by a Full Bench (1) of this Court that a Court of Revenue was a Civil Court within the meaning of ss. 468 and 469 of Act X of 1872, which are replaced by s. 195 of the present Code. It is true that those sections did not contain the provision that "every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie." But the reasons for holding that a Collector trying a suit under the Rent Act is a Civil Court for the purposes of Chapter XXXV of the former Code of Criminal Procedure seem to me to retain all their original force and to be unaffected by the alterations introduced in the corresponding Chapter XV of the present Code. And this being so, I think that the normal course of appeal applicable to civil cases was contemplated in the clause containing the words "the Court to which appeals from the former Court ordinarily lie." Moreover, as a very substantial part of a Collector's judicial work under our Rent Act is appealable only to the District Judge (s. 189, Act XII of 1881, and s. 191 *id.*, where the District Judge is indicated as the Court of "regular appeal" from a Collector's *decree* in "all suits mentioned in s. 93"), I do not discern a sufficient reason in the mere fact that the Collector's *orders* in certain cases (s. 196) are not appealable to the Judge but to the Commissioner, for departing from the rule and practice we laid down in *Q. E.* v. *Sabsukh* (1).

The arguments from convenience preponderate largely in favour of the local and more accessible jurisdiction. [Upon this expression of opinion Straight, J., set aside the order of the District Judge declining jurisdiction and directed him to restore the application for revision from the Collector's order to his file and dispose of it according to law.]

(1) *Queen-Empress* v. *Sabsukh*, I. L. R., 2 All., 533.

APPELLATE CIVIL.

June 30.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

GURDAYAL MAL (DEFENDANT) *v.* JHANDU MAL (PLAINTIFF). *

Pre-emption—Town—Custom—Evidence—Decrees enforcing right.

In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied is admissible evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom.

Gujju Lal v. *Fateh Lal* (1) distinguished, *Koodoottoollah* v. *Mahinee Mohun Shaha* (2), *Sheo Churn* v. *Goodur* (3), and *Lachman Rai* v. *Akbar Khan* (4), referred to.

THIS was a suit to enforce the right of pre-emption in respect of the sale of a plot of land situated in mahalla Saraogian, or of the Saraogis, in qasba Kandhla, zila Muzaffarnagar. The plaintiff based his claim on the custom of the town. Both the lower Courts gave the plaintiff a decree. The defendant vendee appealed to the High Court.

The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellant.

The Hon. *T. Conlan* and Munshi *Kashi Prasad*, for the respondent.

EDGE, C. J., and TYRRELL, J.—This was a suit for pre-emption. The plaintiff alleges generally in the plaint that by reason of his co-sharership he was entitled to a pre-emptive right with regard to the property, and that he had made the necessary demand. By the written statement the defendant denied that there was any custom. The custom has been found on the evidence, some of which was oral, namely, that of the inhabitants of the town. Other evidence which was put in consisted of sale-deeds relating to sales in which the right was enforced, but without the assistance of the Courts of law. Another class of evidence consisted of decrees in suits relating to property in the town, by which the right of pre-emption was recognised and enforced. For the defendants, witnesses were called who

* Second Appeal No. 126 of 1887 from a decree of T. Benson, Esq., District Judge of Saháranpur, dated the 1st December, 1886, modifying a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saháranpur, dated the 2nd September, 1886.

(1) I. L. R., 6 Cal., 171.
(2) 5 Beng. Civ. and Cr. Rep., 290.
(3) N.-W. P., H. C. Rep., 1868, p. 138.
(4) I. L. R., 1 All., 440.

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gave a general denial of the existence of the custom. Those witnesses could not mention any instance in which a claim of pre-emption had been successfully resisted.

It is said that the decrees to which I referred were not admissible in evidence. It appears to me that they were the best evidence of instances in which the right was recognised. They are to my mind the most satisfactory evidence, because they are the result of decisions in cases in which one party alleged the custom and the other denied it. The Courts having heard the evidence decided in favour of the custom. As those decrees were not in suits between these parties, they were not conclusive, but they were excellent evidence to show that the right was asserted in the town by other persons and was recognised by the lawfully constituted legal tribunals. We have been referred to the Full Bench judgment of the Calcutta High Court in the case of *Gujju Lall* v. *Fateh Lall* (1). That case does not bear on the question here. There the question between the parties was as to the right to recover possession of particular property, and the judgment that was sought to be made use of was a judgment in a suit to which the plaintiff was not a party. That the judgments such as we have here are admissible in evidence of the local custom was established by the case of *Koodoortoollah* v. *Mohinee Mohun Shaha* (2). That was a pre-emption suit, and the custom there sought to be established was a custom of pre-emption. In the case of *Sheo Churn* v. *Goodur* (3) the learned Judges of this Court considered that instances of an enforcement of a custom were good evidence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom. If we want further authority, it is to be found in the case of *Lachman Rai* v. *Akbar Khan* (4), in which case the learned Judges considered that proof afforded by judicial record was amongst the most cogent evidence of an existing custom and that it had been enforced. Judicial records in England not between the same parties have been admitted as evidence of the existence of local customs.

It appears to us that the learned District Judge was fully authorised in finding that the custom of pre-emption existed in

(1) I. L. R., 6 Cal., 171.
(2) 5. Rev. Cir. & Cr. Rep., 290.
(3) N.-W. P. H. C. Rep., 1868, p. 138.
(4) I. L. R., 1 All., 440.

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the town. It is said that there was no evidence of the custom having existed or of its having been enforced in this particular part of the town or *muhalla*. That in our judgment is immaterial. The custom applied to the whole town and the greater included the less. There was no evidence that the custom did not apply to this particular ward.

The remaining question is as to the price. The sale-deed stated the price at Rs. 2,500. The Judge found that the true price was Rs. 1,500. It was proved that Rs. 2,500 had been paid in the presence of the Registrar, but there was evidence that immediately afterwards Rs. 1,000 of that sum was returned to the vendee, and there was evidence that the vendor and vendee had said that Rs. 1,500 was the price. That was a question for the Judge, and we cannot interfere with his finding.

There is one point which we have omitted to mention, that is, it is contended that the plaint is bad because it does not specifically set out what the custom was. No doubt it would have been more regular if the custom had been specifically defined in the plaint, but the parties were put to no inconvenience. Each side called evidence, one to the custom and the other to rebut it.

We are of opinion that there is no sufficient reason to warrant us in disturbing the judgment of the Court below. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Mahmood.

1888
May 8, 9.

RAMJIWAN MAL AND OTHERS (PLAINTIFFS) *v.* CHAND MAL AND OTHERS (DEFENDANTS). *

Act XV of 1877 *(Limitation Act), ss.* 5, 14*—Appeal preferred to wrong Court through mistake of law—Exclusion of time—Civil Procedure Code, ss.* 111, 216, 561*—Suit for dissolution of partnership—Set-off—Objections under s.* 561 *—Dismissal of appeal as barred by limitation—Objections not entertainable,*

A suit for dissolution of partnership in which the claim was valued at Rs. 2,000, with a prayer that such balance as might be found due to the plaintiff upon taking the partnership accounts, might be paid to him, is a suit for money within the meaning of s. 111 of the Code of Civil Procedure, and a plea of set-off may be raised in such a suit, and if in consequence of such plea the Court of first instance decrees in favour of the defendant a sum above Rs. 5,000, then by reason of the provision in

* First Appeal No. 213 of 1886, from a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Azamgarh, dated the 31st March, 1886.

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paragraph ii, s. 216 of the Code, an appeal from that decree will lie to the High Court and not to the District Court.

S. 14 of the Limitation Act (XV of 1877) does not contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law, the facts being fully apparent, but is limited to cases where from *bonâ fide* mistake of fact the suitor has been misled into litigating in a wrong Court. The phrase "other cause of a like nature" in the section is vague, and cannot be held to release a person from the obligation to know the law of the land.

The decree in this suit was passed by the Subordinate Judge as the Court of first instance on the 31st March, 1886. Against the decree the plaintiff preferred an appeal to the District Court on the 1st July, 1886, and on the 11th December, 1886, the District Court returned the memorandum of appeal filed in that Court to the plaintiff upon the ground that the subject-matter in dispute was above Rs. 5,000. The plaintiff then on the 20th December, 1886, presented the memorandum of appeal to the High Court, and it was admitted, subject to the consideration by the Bench determining the appeal of any question as to its admissibility, after the period of limitation prescribed for presentation of appeals to the High Court. Upon the hearing of the appeal, the respondent objected to the appeal being entertained, on the ground that it was presented beyond the period of limitation.

Held that no sufficient cause being shown for the delay in the presentation of the appeal, the appeal must be dismissed.

Balwant Singh v. *Gumani Ram* (1) explained.

The entertainment of objections under s. 561 of the Civil Procedure Code is contingent and dependent upon the hearing of the appeal in which such objections are taken, and when that appeal itself fails, is rejected, or dismissed without being disposed of upon the merits, the objections cannot be entertained either.

THE plaintiffs and the defendants carried on a trading business under certain written articles of co-partnership, and according to which the plaintiffs were the proprietors of one-third of the business and the defendants of the remaining two-thirds. Disputes and differences arising between the partners, the plaintiffs requested the defendants to settle the partnership accounts and wind up the business, but the defendants not showing any readiness to do so, the plaintiffs instituted this suit. They prayed the Court to decree a dissolution of the partnership and that the accounts of the said partnership business might be taken by the Court and the assets thereof realised, and that each party might be ordered to pay into Court any balance due from him upon such partnership accounts being taken, and that the debts and liabilities of the partnership might be paid and discharged, and that the costs of the suit might be paid out of the partnership assets, and the balance might be

(1) I. L. R., 5 All., 591.

divided between the parties according to the terms of the agreement, and in the event of the assets being found to be insufficient, the parties might be ordered to contribute in such proportion as should be just to a fund to be raised for the payment and discharge of debts, liabilities, and costs. The plaintiffs also prayed for such other reliefs as the Court might think fit to grant. The approximate value of the claim was laid at Rs. 2,000.

The defendants raised several pleas, the only one material for the purposes of this report being as follows:—An inspection of the account books of the firm would show and prove that Rs. 34,000 were due to the firm from the traders and many other respectable persons of Azamgarh, for which, under the provisions of the contract of partnership, the plaintiffs were and should be responsible, until the whole amount were received by the firm; and that Rs. 23,354-10-3 were due from the plaintiffs, who had appropriated the same. Moreover, the plaintiffs should settle the accounts of the profits.

The Court of first instance (Subordinate Judge of Azamgarh) laid down the following among other issues, *viz.*,—"with reference to the accounts entered in the books and papers of the joint firm and the articles contained in the agreement which is admitted, how much is due from one party to the other?" Finally on the 31st March, 1883, he decreed dissolution of partnership, appointed a receiver to collect all the partnership estate and effects, and ordered a sale of the stock in trade, and he further decreed and ordered that the plaintiffs should pay to the defendants the sum of Rs. 8,041-7-0 within one month of the date of the decree, with costs and interest.

Against this decree the plaintiffs on the 1st July, 1886, preferred an appeal to the Court of the District Judge, and on the 11th December, 1886, the memorandum of appeal was returned to them to be presented to the proper Court on the ground that the subject matter in dispute was above the value of Rs. 5,000.

On the 20th December, 1886, the plaintiffs presented the said memorandum of appeal to the High Court, and the appeal was admitted subject to the consideration of the Bench determining the appeal of any question as to the presentation of the appeal after the period prescribed therefor by law. The respondents to the appeal

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filed objections to the decree appealed from, under s. 561 of the Code of Civil Procedure.

At the hearing of the appeal the respondents objected to the appeal being entertained on the ground that the same was not presented to the Court within the time prescribed by law for presentation of appeals to the High Court, and the appellants answered by urging that the time during which they were *bonâ fide* prosecuting their appeal in the Court of the District Judge should be excluded from the computation of the period of limitation, and that under those circumstances they were entitled to the indulgence allowed by s. 5 of the Limitation Act.

The Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellants.

The Hon. *T. Conlan*, and Pandit *Sundar Lal*, for the respondents.

The facts of the case are further stated in the judgments of the Court.

STRAIGHT, J.—This appeal relates to a suit which was instituted by the plaintiffs-appellants before us in the Court of the Subordinate Judge of Azamgarh upon a plaint which, alleging a partnership as subsisting between the plaintiffs and the defendants, prayed for the following relief:—"That the plaintiffs pray the Court to decree a dissolution of the partnership, and that the accounts of the said partnership trading may be taken by the Court and the assets thereof realized, and that each party may be ordered to pay into Court any balance due from him upon such partnership-account, and that the debts and liabilities of the partnership may be paid and discharged, and that the costs of the suit may be paid out of the partnership assets, and that any balance remaining of such assets, after such payment and discharge and the payment of the said costs, may be divided between the plaintiffs and the defendants according to the terms of the agreement, or that if the said assets prove insufficient, the plaintiffs and the defendants may be ordered to contribute, in such proportion as shall be just, to a fund to be raised for the payment and discharge of such debts, liabilities and costs, and to such other reliefs as the Court shall think fit. The approximate value of the claim is Rs. 2,000."

Now that was a suit which undoubtedly was framed and presented to the Court in contemplation of the provisions of s. 215, Civil Procedure Code. But it is unnecessary for me in dealing with the matter to which I shall have presently to advert, to make any reference to these forms of suits and the shape in which they would be regarded by a Court in England. I have simply to see how far it is governed by any other provisions in the Civil Procedure Code, and if it is governed by those provisions, to apply them.

A variety of pleas were raised in the statement of defence to this plaint, the only material one of which here is what in substance amounted to this, that in the taking of any accounts as between the plaintiffs and the defendants, the defendants were to have the advantage of, and to be benefited to the extent of, the sum of Rs. 23,354-10-3, which they alleged had been received by the plaintiffs upon their account in the course of the partnership business, and in respect of which the plaintiffs were bound to pay them that sum.

The Subordinate Judge who tried the case, having declared the partnership dissolved and having caused the accounts to be taken, came to the conclusion, as declared by his decree, that the defendants were entitled to receive from the plaintiffs a sum of Rs. 8,041-7-0. Consequently, there was a decree in favour of the defendants given by the Subordinate Judge by which they were declared to be entitled to the sum which I have mentioned.

From that decision of the Subordinate Judge, which was passed upon the 31st March, 1886, the plaintiffs preferred an appeal to the Court of the Judge on the 1st July, 1886, and on the 11th December of the same year, the memorandum was returned to them upon the ground that the subject-matter in dispute was more than the sum of Rs. 5,000. The memorandum of appeal was then brought by the plaintiffs and presented to this Court upon the 20th December, 1886, and the appeal was admitted subject to the report, that is to say, subject to the consideration of the Bench determining the appeal of any question as to its admissibility by reason of being beyond the limitation period.

Mr. *Conlan* to-day, when the appeal was called on, objected to our entertaining it, upon the ground that the decree of the Sub-

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ordinate Judge having been passed upon the 31st March, and the appeal only having been filed in this Court upon the 20th December, 1886, it was barred, and we were therefore bound to dismiss the appeal.

On the other hand, it has been contended by Pandit *Ajudhia Nath* for the appellants that his clients are entitled to the indulgence which is mentioned in s. 5 of the Limitation Act. He has claimed that indulgence upon the grounds that by applying the analogy of s. 14 of the Limitation Act, and following the ruling of this Court, to which I was a party, in *Balwant Singh* v. *Gumani Ram* (1) he should be allowed the period of time during which his client was *bonâ fide* prosecuting his appeal, though erroneously, before the Court of the District Judge.

I have only to say with regard to that ruling that it was never ruled by my brother Tyrrell, who delivered the judgment in that case, in which I concurred, that the provisions of s. 14 of the Limitation Act were to be bodily imported into s. 5 of the said Act. All that we did say was that such circumstances as are therein mentioned might supply good cause within the meaning of s. 5 of the Limitation Law. We did not say that the time during which an appeal has been preferred and pending in a wrong Court *shall* be excluded for the purposes of calculating time, but we did say that it *may* be excluded for the purposes of the indulgence as explaining the delay in bringing the appeal to the right Court.

Out of this contention of Pandit *Ajudhia Nath* has arisen a serious question, and one that presses my brother Mahmood very much, namely, the question of jurisdiction, that is to say, of whether, looking to the terms of this plaint and to the terms of the statement of defence, the decree which was given by the Subordinate Judge was a decree which was necessarily appealable to this Court and not to the Court of the District Judge. We have heard a very long and learned argument upon this particular point, and I am free to confess that at one period of the argument I entertained a very strong view different to the view of my brother Mahmood, as to this suit falling within the terms of s. 111 of the Civil Procedure Code. My reason for that was that it appeared to

(1) I. L. R., 5 All., 591

me, looking at it from the point of view of an ordinary suit for dissolution of partnership, that it was not a suit for the "recovery of money" in the ordinary sense of the term. But as has been pointed out by my brother Mahmood, this class of suits as mentioned in s. 111, Civil Procedure Code, as suits for the recovery of money, is a class of suits in contradistinction to suits for the recovery of immoveable property, restitution of conjugal rights and the like, and it contemplates a class of cases in which or out of which a money claim arises. He has gone so far with me that he admits that a mere suit for dissolution of partnership would not be a suit for money, nor possibly would a suit asking for a declaration that an account should be taken. But when the plaint goes on and says:—"Take the accounts and when you have made up the accounts of this partnership, if anything is due upon those accounts, give me what is due to me,"—then that is in fact a claim for money and nothing else. I agree that that may be so. The suit upon the face of it in all its aspects is a suit for recovery of money, because the plaintiff says, "when you have taken the accounts, if anything is due to me, be good enough to direct that it be paid to me."

What is then the nature of the paragraph of the statement of defence to which I have referred? That is not a general assertion on the part of the defendants in which they say to the Court taking this account that some balance will be found in their favour on the taking of accounts, but it says in specific terms that "in any event in taking that account you must give us credit for the sum of Rs. 23,354-10-3, because that actual sum has been received by our partners, which we ought to have received, and which has been misappropriated by them."

I cannot say that a sum claimed in that way is not a sum claimed in the nature of a set-off. That is to say, the defendants say:—"Whatever may be found due to the plaintiffs upon settlement of accounts, that must be reduced by Rs. 23,354-10-3 as the amount they owe to us, and if that is not sufficient they must pay the balance." I do not think that under these circumstances I am straining construction here to hold that this is a claim for money by the plaintiffs in which the defendants plead a set-off. If I am

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correct in that view, then any further difficulty in the matter ceases, because it is specifically provided by s. 216 of the Civil Procedure Code that in matters of this kind, where a set-off has been claimed and a decree has been passed in favour of the defendant, the amount of that decree in the defendant's favour determines the forum of appeal. The decree of the Subordinate Judge, being for a sum in excess of Rs. 8,000 in favour of the defendants, it is obvious therefore that the appeal of the plaintiffs did, according to the terms of s. 216 of the Civil Procedure Code, lie to this Court and not to the Court of the District Judge, and in going to that Court they made a mistake of law, for which, according to the ordinary rules, they are not entitled to be excused.

It has been argued on behalf of the appellants that looking to the difficulty of the question which has involved us in so much discussion here, this is another indication that their action in going to the District Court should be regarded as a not unreasonable mistake, and that they, though acting erroneously, acted with perfect *bona fides* in the matter. It does not appear to me that there is any adequate or sufficient explanation offered here to us to justify us in extending the indulgence mentioned in s. 5 of the Limitation Act. They are supposed, or those who advise them are supposed, to know the provisions of the statute, and to be aware that under its terms, if an appeal is preferred, it has to be preferred to a particular Court. It is no excuse merely to say that they preferred their appeal to a wrong Court by mistake. As regards the interval of time which elapsed between the 11th December, when the memorandum was returned, and the 20th December, when it was presented to this Court, the case is absolutely bare of any explanation at all as to that delay. Under all the circumstances I am of opinion that it has not been made out to my satisfaction that the appellants acted *bonâ fide* in this matter, or that they have shown any good cause for granting them the indulgence mentioned in s. 5 of the Limitation Act. That being so, I have come to the conclusion that the objection of Mr. *Conlan* to the hearing of this appeal is entitled to succeed, and the appeal must be and is dismissed with costs.

MAHMOOD, J.—I have arrived at the same conclusion as my learned brother. But because in the course of the argument upon

the preliminary point raised by Mr. *Conlan* in this case as to the hearing of the appeal, there was not full accord between the view which I was inclined to take of the case and that which my learned brother was inclined to take, I think it necessary to state the exact reasons why I have arrived at the same conclusion.

So far as the preliminary point is concerned, the arguments of Mr. *Conlan*, on the one hand, and that of Pandit *Ajudhia Nath*, on the other, raise two questions for consideration, both questions being only part and parcel of one and the same point, that is, whether this appeal has been presented within the time provided by art. 156, sch. ii, Limitation Act, and whether the provisions of s. 5 of the Limitation Act would justify us in extending the ordinary period of limitation. The decree from which this appeal has been preferred was a decree passed on the 31st March, 1886, and this appeal was not preferred to this Court till the 20th December, 1886, that is to say, long after the period of limitation provided by the article to which I have referred. It is clear that in administering the rule of limitation we are bound to administer it in two manners only, either as a lax system, the periods of limitation to be held *in terrorem* over the heads of the litigants and to be modified, varied or fluctuating according to the individual views or wishes of the Judges, or as definite rules of law, giving to the population for whom those laws have been framed a guarantee that after a lapse of a certain period they may rest in peace and rely upon titles or other rights which they have acquired. This is a matter upon which many judgments have been delivered in England and other civilised countries. In India the question as to the exact manner in which such statutes should be administered was, no doubt, fully considered by the Legislature in framing s. 4 of the Limitation Act, which gave expression not to a modifiable, variable or fluctuating rule, but to a very definite rule, namely, "every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, *shall be dismissed*, although limitation has not been set up as a defence." That rule, stringent as it is, is subject to the other provisions of the enactment, among which s. 5 is no doubt an important provision. It was in connection with the manner in which the statutes of limitation should be

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interpreted that, in delivering my judgment in the case of *Mangu Lal* v. *Kandhai Lal* (1), I went out of my way to give as definite an expression as I could to the view, following the language of Mr. Justice Story, that statutes of limitation were statutes of repose and that they should be administered, not in a variable manner, but as strictly as possible, in order to strengthen the repose at which they aim. That same *ratio* was the reason why in the case of *Husaini Begam* v. *The Collector of Muzaffarnagar* (2) I applied the period of limitation as against a Muhammadan *pardah-nashin* lady who had not chosen to come within the proper period. In that case I had the misfortune to differ with my learned colleague, but the judgment which I delivered was upheld in appeal (3).

To the views which I then expressed I still adhere; and in determining this case I shall base my judgment upon the solitary question whether or not the present appellants have preferred this appeal within time, even taking the indulgence of the provisions of s. 5 into account. Now it has been argued on behalf of the appellants by Pandit *Ajudhia Nath* upon the authority of the ruling to which my learned brother has referred in *Balwant Singh* v. *Gumani Ram* (4), that the provisions of s. 14 of the Limitation Act are virtually imported into s. 5 of the Limitation Act, and that when there has been a *bonâ fide* prosecution of a case in a Court having no jurisdiction, such circumstance *ipso facto* amounts to a rule of protection with reference to such cases, so as to entitle the appellants to deduct from the period of limitation such period as has been spent in litigation in a wrong Court. My brother Straight has already stated that that is not the effect of that ruling, and I do not understand it to amount to anything more than this, that the considerations mentioned in s. 14, Limitation Act, are or may be elements for consideration whether the delay is or is not to be excused within the meaning of s. 5 of the Limitation Act. Beyond that I am not prepared to go, because I hold that the provisions of s. 14 are not applicable to limitation for appeals, but to limitation for original suits and applications. If I were to hold otherwise, I should be crediting the Legislature with a surplusage, namely, the surplusage of framing s. 5 notwithstanding s. 14.

(1) I. L. R., 8 All., 475. (2) I. L. R., 9 All., 11.
(3) I. L. R., 9 All., 655. (4) I. L. R., 5 All., 591.

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The question then is, is this appeal barred by limitation or not; and for the purposes of determining this, there is no doubt that, even giving the appellants the benefit of such analogical principles as are contained in s. 14, we have to determine whether or not the action of the present plaintiffs-appellants in going to the Court of the District Judge of Azamgarh was or was not a *bonâ fide* one. The expression *bonâ fide*, which is translated in English as "good faith," is not exhaustive, and is defined in the last part of s. 3 of the Limitation Act, where it is said "nothing shall be deemed to be done in good faith which is not done with due care and attention." Did the plaintiffs in this case act with due care and attention when they in this suit, notwithstanding the fact that the decree was for an amount exceeding Rs. 8,000, went up to the District Judge, instead of coming up in first appeal to this Court, from the decree of the 31st March, 1886? Indeed, Pandit *Ajudhia Nath* on behalf of the appellants conceded, and he could not well do otherwise, considering that the order whereby the appeal was returned by the District Judge to the appellants was never contested in any proceeding, and that this appeal has been finally preferred to this Court, that the appeal would lie to this Court, and that this Court was the proper Court to entertain such an appeal.

In connection with the question of *bona fides*, however, the learned pleader has argued that the provisions of s. 14 of the Limitation Act are so broad as to include within their scope, not only mistakes of fact, but also mistakes of law. The learned pleader has gone the length of contending that in the present case, although the appeal would lie here, it was an innocent mistake made by the appellants to go to the Court of the District Judge with their appeal.

I am of opinion that, so far as this contention concerns mistakes of law, the authority of the maxim, *Ignorantia legis neminem excusat*, has been so formally settled both in England and India that it would be the shaking of established authority to maintain that ignorance of law or mistakes of law are reasons for the excuse, and, as such, furnish elements for extending the period of limitation which the statute law has provided.

In my opinion s. 14 of the Limitation Act itself does not contemplate cases where questions of want of jurisdiction arise from

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simple ignorance of the law, the facts being fully apparent and clear, but is limited to cases where from *bonâ fide* mistakes of fact the suitor has been misled into litigating in a wrong Court. The phrase "*other cause of a like nature*" which occurs in the section is rather vague, but it cannot be held to undo the effect of the constitutional obligation which the law imposes upon every citizen to know the law of the land in which he lives.

But the learned Pandit went further in supporting the case of the appellants, and he contended that in the present case jurisdiction did properly lie in the Court of the Judge of Azamgarh. This is an argument which is inconsistent with the fact of this appeal having been finally filed here. But I have listened to it with care, because, as I hold, we are bound to see whether the learned Judge of Azamgarh was not the proper authority to hear the appeal and whether we as the Judges of the High Court have any jurisdiction to hear the appeal. The whole contention so far as this part of the argument is concerned rests entirely upon the interpretation of s. 111 of the Code of Civil Procedure read with the later s. 216 of the same Code. The plaintiffs came into Court assessing by estimate the value of their claim to be Rs. 2,000, and a further relief was also prayed that such balance as might be found due to the plaintiffs might be made over to them. The suit as brought was no doubt a suit for dissolution of partnership, a claim which neither in the Courts of equity nor in the Courts of law can be decided without the taking of accounts. As I understand, in such an action, both in England and in India, the ordinary relief prayed for and the ordinary decree made is that upon such accounts being taken the balance should be made over to the parties to whom such sums might be due. I mention this, because unless this suit falls under the category of a suit for money within the meaning of s. 111 of the Civil Procedure Code, I should have had considerable difficulty in deciding whether or not we, as the High Court, are the proper Court of appeal in this case. The suit is, in my opinion, a suit for money, within the meaning of this section; because the illustrations which the Legislature has provided to that section show that, no matter what the title may be, no matter whether such title arises *ex delicto* or *ex contractu*, so long as the relief sought is to recover money, it is a suit for money, and such

a plea of set-off may be raised within the meaning of that section. There are cases cited by Mr. *Conlan*: *Kishorchand Champalal* v. *Madhowji Visram* (1), *Bhagbat Panda* v. *Bandeb Panda* (2), *Kistnasamy Pillay* v. *The Municipal Commissioners of the Town of Madras* (3), in which Courts of justice in India have extended the rule, and have held that the provisions of that section are not exhaustive, and the Courts of justice have allowed set-off in those cases. Whether I am prepared to adopt and go the whole length of the rules therein laid down it is not necessary for me to say. But I am clearly of opinion that this present suit was a suit for money, and that it was a suit which would admit of a set-off.

In this case the defendants came into Court not denying the partnership, but setting up accounts of their own, and alleged that as the results of those accounts the defendants were entitled to a decree for a sum of Rs. 23,000. It was, indeed, in consequence of such a plea of set-off that the Court below in acting under that section took accounts, and as the result of that account gave the defendants a decree exceeding a sum of Rs. 8,000. It could not be understood to have been a decree which would ordinarily be appealable to the District Judge of Azamgarh, because the jurisdiction of the District Judge in appeals is limited to Rs. 5,000 (*vide* s. 22, Act VI of 1871). There seems therefore no reason to think that this decree was other than such as s. 216 of the Civil Procedure Code contemplates, and in respect of which the second paragraph of that section is fully applicable. That paragraph says:—"The decree of the Court with respect to any sum awarded to the defendant shall have the same effect, and be subject to the same rules in respect of appeal or otherwise, as if such had been claimed by the defendant in a separate suit against the plaintiff." Here the decree being beyond the jurisdiction of the Judge, clearly the appeal lay here.

There is no explanation supported by affidavit or otherwise why this appeal was not duly preferred in due and proper time directly from the judgment of the Subordinate Judge. But even if it be granted that the period during which the appeal was pending in the Court of the District Judge of Azamgarh be excluded, there is

(1) I. L. R., 4 Bom., 407. (2) I. L. R., 11 Calc., 557.
(3) 4 Mad. H. C. Rep., 120.

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no explanation why between the dates mentioned by my brother Straight sufficient diligence was not employed by the appellants to come to this Court with their appeal. I hold, therefore, that the decree now appealed from was a decree appealable only to this Court, and that the appeal should have been preferred within the period prescribed by art. 150, sch. ii, Limitation Act; and that not having been so preferred, the delay which has taken place is not duly explained, and that the appeal is therefore barred by limitation; and I agree with my brother Straight in dismissing the appeal with costs.

[The judgment of the Court disposing of the objections taken by the respondents was as follows :—]

MAHMOOD, J.—The question which has arisen to-day relates to certain objections taken by Pandit *Sundar Lal's* clients, the defendants-respondents in the suit, to the decree of the lower appellate Court, under s. 561, Civil Procedure Code. By reason of the judgment of my brother Straight and myself, the appeal in which these objections were raised was dismissed yesterday, not upon the merits, which were never heard, but upon the ground that the appeal should not have been admitted, because it was barred by limitation. Pandit *Sundar Lal* argues that notwithstanding this circumstance, and notwithstanding the fact that the dismissal of the appeal was due to the objections and contentions raised on behalf of those defendants-respondents, we, as a matter of law, are bound to proceed with those objections under s. 561 and to deal with them upon their merits both as to fact and law.

There is authority in the Indian cases to be found in the cases of *Baroda Kant Bhuttacharjee* v. *Pearee Mohun Mookerjee* (1) and *Coomar Poresh Narain Roy* v. *Watson and Co.* (2), where it was held that when an appeal is dismissed for default, the hearing of objections under s. 348 of Act VIII of 1859 cannot be allowed to proceed, and similarly it has been held that where an appeal is withdrawn the same is the effect upon the cross-objections. The same is the effect of the case of *Bahadoor Singh* v. *Bhugwan Dass* (3) and of the case of *Dhondi Jayannath* v. *The Collector of Salt*

(1) 23 W. R., 57. (2) 23 W. R., 229.
(3) N. W. P. H. C. Rep., 1866, p. 23.

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Revenue (1), which case was followed with my concurrence by Oldfield, J., in *Maktab Beg* v. *Hasan Ali* (2).

I take the effect of those various cases to be that the entertainment of objections such as s. 561, Civil Procedure Code, contemplates, is contingent and dependent upon the hearing of the appeal in which such objections are raised, and that when the appeal itself fails, is rejected or dismissed without being disposed of upon the merits, the objections follow its fate, and cannot be entertained either.

Pandit *Sundar Lal* has argued that this exact point has never yet been ruled, because, as the learned pleader contends, here the appeal was heard, though it was dismissed upon the ground that it was barred by limitation. This contention may at first sight appear to be supported by the *ratio decidendi* of the ruling of the Madras High Court in *Venkataramanaiya* v. *Kuppi* (3), which was followed by the Bombay High Court in *Dhondi Jagannath* v. *The Collector of Salt Revenue* (1), but in my opinion those cases are inapplicable, because there the object of withdrawing the appeal aimed at preventing the respondent, after the hearing of the appeal had commenced, from insisting upon his cross-objections. Under such circumstances, withdrawal of an appeal being a matter within the volition of the appellant, the Court was probably right in hearing the cross-objections notwithstanding the withdrawal. Here the plea of limitation is fatal to the hearing of the appeal upon the merits, and the plea has been taken by the respondents themselves, and being a plea *in limine* barring the hearing of the appeal upon the merits, we have given effect to it as we are bound to do under s. 4, Limitation Act, and have not heard the appeal upon the merits. Like the privilege of set-off in original actions, and I say this only analogically, the Legislature has thought fit to confer upon the parties respondents in appeal the right of being able to raise objections such as s. 561 contemplates. The practical effect of such objections is that they are in themselves appeals to be dealt with as such, but the privilege is qualified by very serious considerations. One consideration is that such objections are not subject to the same period of limitation as appeals. In the next place,

(1) I. L. R., 9 Bom., 28. (2) I. L. R., 8 All., 551.
(3) 3 Mad. H. C. Rep., 302.

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they may be argued as against the decree of the Court below itself, although from that decree no appeal has been preferred. These rights were not intended to be used in such a fashion as to be available to the respondent who apparently accepted the terms of the decree of the Court of first instance, and who never wanted to appeal therefrom, and it was only after the opposite party had appealed that he raised objections. We have already held that the original appeal of the plaintiffs in the suit could not be heard on the merits, as it was barred by limitation, and were we to allow these objections to be dealt with now separately and irrespective of that appeal, we should be practically holding that an appellant who prefers an appeal long after the prescribed period of limitation, may confer upon the respondent the right of having an appeal of his own heard in the shape of objections under s. 561, Civil Procedure Code, although, if the original appeal was barred by limitation, *a fortiori* such objections ought to be barred also.

I am of opinion that the *ratio decidendi* of the cases which I have cited applies as much to cases where an appeal is rejected or dismissed, as this appeal was dismissed by us yesterday, upon the ground that it could not be entertained because it was barred by limitation.

It is therefore not necessary for us to enter into those objections, and they are rejected with costs.

STRAIGHT, J.—I am of the same opinion.

Appeal and objections dismissed.

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May 25.

Before Mr. Justice Mahmood.

BHAGWAT DAS (PLAINTIFF) *v.* PARSHAD SINGH (DEFENDANT.)*

Mortgage—Redemption before expiration of term—Mortgagor entitled to redeem before expiration of term unless mortgagee can show that the term binds mortgagor—Usufructuary mortgage.

No such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the

* Second Appeal No. 2283 of 1886 from a decree of Maulvi Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 18th September, 1886, confirming a decree of Munshi Mata Prasad, Munsif of Etáwah, dated the 8th July, 1886.

debt due by him to the mortgagee. Where parties agree that possession of any property shall be transferred to a mortgagee by way of security and repayment of the loan for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term, though the creation of a term is by no means conclusive on the point.

The term fixed for payment of a debt should be presumed to be a protection only for the debtor till a contrary intention is shown.

THIS was a suit for redemption of a usufructuary mortgage made on the 15th December, 1876, by two persons, Udit Singh and Musammat Maharaji, in favour of one Mohar Singh. On the 19th of August, 1878, the mortgagors conveyed their equity of redemption to Bhagwat Das, the plaintiff in the suit. Both the lower Courts dismissed the suit, and on appeal to the High Court, the point for contention was whether or not the plaintiff was entitled to redeem the mortgage before the expiry of the stipulated period for redemption mentioned in the instrument of mortgage.

The material clause in the instrument of mortgage, and the facts as well as the arguments of counsel are fully set forth in the judgment of the Court.

Mr. *G. T. Spankie*, for the appellant.

Mr. *S. Howell*, for the respondent.

MAHMOOD, J.—In order to explain the question of law which arises in this case it is necessary to state the following facts:—

On the 15th December, 1876, two persons, Udit Singh and Musammat Maharaji, borrowed a sum of Rs. 100 from one Mohar Singh, deceased, (represented in this litigation by the defendants-respondents) and executed a mortgage-deed in his favour. The nature of the mortgage was usufructuary, and under its terms the mortgagee was to be placed in possession and to appropriate the profits of the mortgaged property in lieu of interest, the rate whereof is not specified in the mortgage-deed. The principal part of the deed, so far as the question in appeal is concerned, runs as follows:—

"We have now delivered the possession of the mortgaged zemindari share to the mortgagee. Neither shall we claim profits and mesne profits from the date of the mortgagee's possession, nor shall the mortgagee claim interest on the debt. We shall pay the principal mortgage money in 15 years (*asl zar-i-rahn arsa pandrah*

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baras men adá karengen). If upon the stipulated promise we are unable to pay the mortgage-debt above mentioned, then whenever we repay the principal mortgage-money at the end of Jaith in any year, the mortgaged property shall be redeemed."

The mortgagee was accordingly placed in possession, and on the 19th August, 1878, the aforesaid mortgagors, Udit Singh and Musammat Maharaji, executed a sale-deed whereby they conveyed their rights and interests in the mortgaged property to the present plaintiff, Bhagwat Das.

Upon the title so derived, the plaintiff instituted the present suit on the 15th June, 1886, with the object of obtaining possession of the mortgaged property by redemption on payment of the sum of Rs. 100 mortgage-debt above-mentioned.

The only ground upon which the suit was resisted is that it was premature, inasmuch as it was instituted before the expiry of the term of 15 years specified in the mortgage-deed of the 15th December, 1876.

Both the Courts below in interpreting that document have rived at the conclusion that the term of 15 years was binding as much upon the mortgagor as upon the mortgagee, and upon this ground they held that the right to redeem could not accrue before the expiry of the stipulated term of 15 years, and that the action was therefore premature and should be dismissed.

From the decree of the lower appellate Court this second appeal has been preferred, and Mr. *Spankie* in arguing the case for the appellant has addressed a learned argument to me upon the contention, that, in the first place, the Courts below have misconstrued the mortgage-deed, and in the next place, even if their construction be accepted to be correct, the plaintiff as representing the equity of redemption is entitled to redeem the mortgage even before the expiry of the term of the mortgage; because, as the learned counsel contends, such terms must be understood to be stipulations for the protection of the mortgagor, and so long as the mortgagee receives all that is due upon the mortgage he cannot resist such a suit.

This contention is opposed by Mr. *Howell* on behalf of the defendants-mortgagees, and the contention of the parties therefore

raises two points for determination; one relating to the interpretation of the mortgage-deed, and the second as to the rule of law applicable to such suits.

Upon the first of these points, having consulted the terms of the mortgage-deed in the original Hindustani, I am of opinion that the parties intended that the mortgage should continue at least for a period of 15 years, after which it would become redeemable. The Hindustani words "*arsa pandrah baras men*" may no doubt be interpreted to mean "within a period of 15 years," but followed as those words are by the phrase *wadah par*, "at the promised time," they cannot have any meaning other than that 15 years was the term fixed for the mortgage. Mr. *Spankie's* contention would involve the conclusion that the term of 15 years need never have been mentioned at all, as the mortgage was redeemable at any time according to his contention. I cannot give the parties credit for any such surplusage, there being nothing in the document to justify such a construction. On the contrary, as I have already said, the phrase *wadah par*, "at the promised period," must refer to the expiry of 15 years, for otherwise the sentence which immediately follows, which provides that in subsequent years the mortgage would be redeemable at the end of any Jaith, would also become superfluous.

Then as to the latter part of Mr. *Spankie's* argument—I am not aware of any such general rule of law as would go the length of laying down that in all cases and in all circumstances the term for which a mortgage is executed is binding only upon the mortgagee and that the mortgagor can enforce redemption even before the expiry of the stipulated period. A mortgage is only a kind of contract whereby certain rights and obligations are created as between the mortgagor and the mortgagee. Such rights and obligations may be subjected to any terms and conditions not prohibited by law, and the fixation of any particular period as the term of the mortgage or as the time when redemption is to take place is not such a stipulation as the law prohibits. Indeed, Mr. *Spankie* himself conceded that the term of 15 years mentioned in the mortgage-deed was binding upon the mortgagee, so as to preclude him from foreclosure or any other remedy which he may have for recovery of the mortgage

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debt before the lapse of that time. But the learned counsel argues that in the absence of any express covenant in the mortgage-deed to the effect that the same shall not be redeemable before the expiry of 15 years, the presumption of law is that the term was intended only for the protection of the debtor, *i. e.*, the mortgagor.

I think there might have been considerable force in this contention, if the nature of the mortgage and the terms of the deed did not preclude it. The relation between the mortgagor and the mortgagee is that of debtor and creditor, and redemption is the process by which the debt due on the mortgage is paid off. When in such a contract of mortgage a term of payment is fixed, the ordinary rule would be the same as in regard to a term of payment fixed in any other kind of obligations of debt. Upon this point Pothier in his treatise on *Obligations* (Vol. I, p. 132) has the following :—

"It remains to observe, concerning the effect of a term, that being presumed to be inserted in favour of the debtor, the debtor may very well defend himself from payment before the expiration of the term, but the creditor cannot refuse receiving if the debtor is willing to pay, at least unless it appears from the circumstances that the term was appointed in favour of the creditor, who is the holder, as well as of the debtor."

This, then, being the general principle, I have to consider how it is applicable to mortgages. In *Vadju* v. *Vadju* (1) Westropp, C. J., following the authority of *Brown* v. *Cole* (2) and some Indian cases, held that the right of redemption and the right of foreclosure are coextensive, in the absence of any stipulation, express or implied, to the contrary, and that in such cases when a day is fixed for payment, the mortgagor is not at liberty to insist on redemption before the expiration of the period named. In that case the mortgage-deed stipulated that the mortgagor would pay the mortgage-debt *within ten years* and redeem the mortgaged property, and the suit having been brought before the expiry of that term, the learned Chief Justice held that the suit was unsustainable because prematurely instituted, and that the mere use of the word "*within*" was not a sufficient indication of the intention of the parties that the mortgagor might redeem in a less period than the ten years mentioned in the mortgage-deed. The same ques-

(1) I. L. R., 5 Bom., 22. (2) 14 Sim., 427.

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tion was considered by Turner, C. J., in *Sri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Vairicherla Surianarayanaraju Bahadur* (1) upon somewhat broader principles than the rule of the English law as to the right of redemption and the right of foreclosure being presumed to be coextensive, with reference to the period mentioned in the mortgage-deed for payment of the mortgage-debt, and the *ratio decidendi* adopted in that case seems to me to be scarcely in full accord, upon minor points, with the views upon which the judgment of Westropp, C. J., in *Vadju* v. *Vadju* (2) proceeded. To put the matter briefly, the general effect of the Bombay case is to lay down that the mere fixation of a term for paying off the mortgage-debt is to be presumed to be binding as much upon the mortgagor as upon the mortgagee unless the contrary is clearly shown, whilst the effect of the Madras case is that where the mere fixation of the term occurs in a mortgage-deed, the presumption is that the date is fixed for the convenience of the debtor, and that he may repay the debt at an earlier period, unless the mortgagee could show that any such stipulations existed between him and the mortgagor as would debar the latter from redeeming the mortgage before the expiry of the term mentioned in the mortgage. In other words, whilst Westropp, C. J., would have the presumption as to the binding effect of the term of mortgage in favour of the mortgagee, Turner, C. J., would presume in favour of the mortgagor that the mortgage was redeemable at any time, unless the mortgagee could show from the nature of the mortgage or other circumstances that redemption should not be allowed before the expiry of the time mentioned in the mortgage-deed. The two cases are, however, undistinguishable so far as the result is concerned, because in both cases the mortgage appears to have been of a usufructuary nature, in which the term of the enjoyment of the possession of the mortgaged property seems to have formed a substantial part of the terms of the mortgage itself, as was also the case in *Soorjun Chowdhry* v. *Imambundee Begum* (3) The same principle, however, appears to have been extended by a Division Bench of this Court in *Raghubar Dayal* v. *Budhu Lal* (4) to simple mortgages or hypothecation bonds in which a term of years is stated as the period of payment of the mortgage-debt, and in doing

(1) I. L. R., 2 Mad., 314.
(2) I. L. R., 5 Bom. 22.
(3) 12 W. R., 527.
(4) I. L. R., 8 All., 95.

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so the learned Judges seem to have adopted in its integrity the rule laid down by Westropp, C. J., in *Vadju* v. *Vadju* (1), where, as I have already said, the nature of the mortgage being usufructuary, the period of enjoyment of possession by the mortgagee would form a substantial part of the contract, lending force to the contention that such possession and enjoyment could not be put an end to at the will of the mortgagor before the expiry of the term for which the mortgage was made.

Having so far referred to the principal rulings bearing upon the subject I have no hesitation in adopting the *ratio decidendi* upon which the judgment of Turner, C. J., in *Sri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Vciricherla Suriauarayana-raju Bahadur* (2) proceeded, for, as I understand, that judgment enunciates no such rigid principle as that adopted by Westropp, C. J., in *Vadju* v. *Vadju* (1) that redemption and foreclosure are coextensive in the absence of any stipulation to the contrary.

I have already said that the relation between a mortgagor and mortgagee is that of a debtor and creditor respectively, the main distinction between a simple debt and a mortgage-debt being that, whilst in the former case the obligation to pay the money is a simple personal obligation, in the latter a security of property is given as the means whereby such obligation is to be discharged. The difference rests, not in the essence of the contract but in the *modus operandi* agreed upon by the parties in respect of discharge of the obligation of the debt. In the case of a simple debt, the law provides a suit resulting in a simple money-decree to be executed or enforced in such manner as the rules of procedure for the time being prescribed. In the case of a mortgage-debt, the remedies of the mortgagee-creditor for realising his debt may lie either in foreclosure, or in obtaining possession of the mortgaged property, or in bringing such property to sale, according as the terms of the mortgage contract itself may be. But whether the debt is a simple money-debt or a debt secured by mortgage, one element is common to them all, namely, that before the obligation can be extinguished it must be discharged by payment or by such other methods as are appropriate to the nature of the obligation.

(1) I. L. R., 5 Bom., 22. (2) I. L. R., 2 Mad., 314.

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This being the common element of the obligation to pay a debt, the fixation of any particular period for discharge of the obligation must necessarily be governed by the same principles. Parties to a contract of debt, as indeed parties to any other class of contracts, are at liberty to enter into any stipulations as to the time, place, and mode of discharging such obligations, so long as such stipulations are consistent with the law of the land where they are made. The fixation of a period for discharge of a debt is nothing more or less than one kind of such stipulations, and I am not aware of any rule of law which would prohibit a debtor from stipulating that the debt should not be demandable from him before the expiry of a particular period, nor of any rule which would prohibit a creditor from stipulating that the debt due to him will not be received by him till after the expiry of any particular period. Where such stipulations are already expressed, no such difficulties arise as those in this case, for, if here the mortgage-deed of 15th December, 1876, expressly stated that the mortgagor could not redeem the mortgage before the expiry of the 15 years term mentioned therein, this litigation would probably never have been commenced. But the mortgage-deed contains no such stipulation in express language, and the Courts have to decide whether any such stipulation was implied in the contract of mortgage.

In the present case I am of opinion that because the terms of the mortgage itself do not expressly state that the mortgage shall not be redeemable (that is, the mortgage-debt shall not be paid off) before the expiry of the 15 years mentioned therein, it rested upon the mortgagee to show that he is entitled to decline to receive payment of the mortgage-debt before the expiry of that period. With all respect due to the ruling of Westropp, C. J., in *Vadju* v. *Vadju* (1) which was followed by a Division Bench of this Court in *Raghubar Dayal* v. *Budhu Lal* (2), I am of opinion that no such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless indeed the mortgagee succeeds in showing that by reason of the terms of the mortgage itself the mortgagor is precluded from paying off the debt due by him to the mortgagee, and, to use the

(1) I. L. R., 5 Bom., 22. (2) I. L. R., 8 All., 95.

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language of Turner, C. J., in *Marana Ammanna* v. *Pendyala Perubotulu* (1), "it requires a clear expression of intention to deprive a mortgagor of his right to redeem at any time on payment of the debt." I respectfully think that the rule that the right of redemption and the right of foreclosure are coextensive and coincident, as to the time when these rights may be respectively exercised by the mortgagor and the mortgagee, is not a rule recognised by the law of mortgage, at least in this part of the country. As I take the law, both these rights rest upon the terms of the mortgage itself, and considering that the juristic reasoning as stated by Pothier requires that a term fixed for payment of a debt should be presumed to be a protection only for the debtor till the contrary is shown, I hold that in this case it rested upon the mortgagee to show why he is justified in declining to accept all that is due to him upon the mortgage, though the offer of such payment is made before the period of 15 years at the end of which the mortgagor, at the time of the mortgage, as interpreted by me, expected to be able to pay off the mortgage-debt.

But whilst holding these views upon the principles of law applicable to such payment of debts, I am of opinion that in the present case the mortgagee has succeeded in showing that, by reason of the very nature of the mortgage and the circumstances of the contract, he is entitled to resist redemption on the ground that the period of 15 years mentioned therein must be taken to form a material part of the contract itself, and to have been named not only for the protection of the mortgagor-debtor but also for that of the mortgagee-creditor. The mortgage was of a usufructuary character, in which no rate of interest on the mortgage-debt was specified, and the mortgagee, whilst entitled to possession and the appropriation of profits in lieu of interest, had to run the risk of appropriating only such profits as he could recover during the period of his possession of the mortgaged property, so that, to use the words of Turner, C. J., in the case already cited, "the continuance of the enjoyment of the mortgaged property for a prescribed period forms a material part of the contract," and "it would be inequitable to deprive the mortgagee of this right on the mere ground that the contract was one of mortgage;" and I agree with

(1) I. L. R., 3 Mad., 230.

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what was said by him in the same case that "where parties agree that possession of the property shall be transferred to a mortgagee for a certain term it may be inferred that they intended that redemption should be postponed until the end of the term," though "the creation of a term, is by no means conclusive on this point."

In this view of the case I am of opinion that the lower Courts were right in interpreting the terms of the mortgage-deed of the 15th December, 1876, and that they were right in holding that this suit for redemption, which was brought before the expiry of the term of 15 years stipulated as the promised date of redeeming that mortgage, was premature and, as such, not sustainable.

I dismiss this appeal with costs.

Appeal dismissed.

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June 14.

Before Mr. Justice Straight and Mr. Justice Mahmood.

GIRDHAR LAL AND OTHERS (PLAINTIFFS) *v.* BHOLA NATH AND OTHERS (DEFENDANTS).*

Mortgage—Usufructuary mortgage—Covenant by the mortgagor to pay the mortgagee arrears of rent due at the time of redemption—Payment by mortgagee of arrears of revenue—Right of mortgagee to re-imbursement before redemption—Act IV of 1882 *(Transfer of Property Act), s.* 72 *(b).*

On the 27th August, 1883, M and B jointly executed two usufructuary mortgages for the sums of Rs. 3,000 and 5,000 respectively in favour of the defendants. On the 24th March, 1886, the mortgagors executed another usufructuary mortgage in favour of the plaintiffs for Rs. 15,000, entitling them to possession of the property mortgaged. The second mortgagees instituted a suit to redeem the prior mortgages by depositing in Court the principal sum of Rs. 8,000. The defendants urged that a sum of Rs. 4,000 was due to them besides the principal amount, without payment of which the property in suit could not be redeemed. The Court found that a sum of Rs. 498-15-9 only composed of certain arrears of rent, and an item of arrears of Government revenue paid by the defendants, was due to them, and decreed redemption of the property on condition of payment of the aforesaid sum. Both the parties appealed.

Held that the items of arrears of rent were recoverable under the covenant contained in that behalf in the mortgage deeds; as to the item for arrears of Government revenue, it was clear that unless this revenue was duly paid the whole estate might have been sold to realise it, thereby putting an end to all the rights of the mortgagors and mortgagees; and therefore upon the general principles of law upon which the doctrine of salvage and subrogation proceeds, persons in the position of mortgagees in possession are entitled to claim that sum before the property which they saved from sale for arrears of revenue could be redeemed.

* First appeal No. 101 of 1887, from a decree of Maulvi Saiyid Farid-ud-din Ahmad Khan, Subordinate Judge of Agra, dated the 28th March, 1887.

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Held further, that s. 72 of the Transfer of Property Act only reproduces the rules of law which Courts of justice in India have uniformly adopted.

THE facts of this case are stated in the judgment of Mahmood, J.

Mr. *D. Banerji* and Pandit *Moti Lal*, for the appellants.

Munshi *Newal Behari Bajpai*, for the respondents.

MAHMOOD, J.—The facts of this case are simple, and may be briefly stated for the purpose of disposing of this appeal. On the 27th August, 1883, Mussammat Bibi Makundi Dei and Bishambhar Nath executed a mortgage-deed, whereby they mortgaged the property now in suit to Dhani Ram and Chakkhan Lal for a sum of Rs. 3,000, and the mortgage was of a usufructuary character. Among the covenants contained in the mortgage-deed was the following:—

"At the time of redemption, we shall pay along with the mortgage-money whatever amount of arrears of rent may be found due from tenants at that time. The mortgagees shall, to the best of their abilities, take care of the fruitful and unfruitful trees."

On the same date the aforesaid Bibi Makundi Dei and Bishambhar Nath executed another usufructuary mortgage-deed in favour of the same defendants for a sum of Rs. 5,000, under exactly the same conditions, including the covenant as to payment for arrears of rent which I have already above-mentioned.

On the 24th March, 1886, the aforesaid mortgagors, Bibi Makundi Dei and Bishambhar Nath, executed another usufructuary mortgage-deed in favour of the present plaintiffs, Lala Girdhar Lal, Shigopal and Radha Kishen, for a sum of Rs. 15,000, entitling the second mortgagees to possession of the property in suit.

These second mortgagees have come into Court in this case with the object of redeeming the two mortgages of the 27th August, 1883, and their claim as such is maintainable, because they are puisne incumbrancers seeking to redeem an earlier incumbrance.

The suit was resisted by the first mortgagees upon various grounds; but those which we have to consider in connection with this appeal are that over and above the principal sum of Rs. 8,000 which formed the consideration of the two mortgages of

even date, namely, the 27th August, 1883, a sum of about Rs. 4,000 was due to the mortgagees, and that without the payment of such sum no redemption could take place.

The Court of first instance in dealing with this litigation has decreed the claim for redemption, holding that besides the principal sum of mortgage-money of Rs. 8,000 which had already been deposited by the plaintiffs under the special provisions of the Transfer of Property Act, the sum of Rs. 498-15-9 was still due under the two mortgages of the 27th August, 1883. This sum consisted of four items, which were the following:—

	Rs.	a.	p.
1. Arrears for 1292 and 1293 F. on account of manza Ataus	165	3	6
2. Arrears for 1292 and 1293 F. on account of manza Khaki	122	2	0
3. Arrears for 1293 F. on account of manza Khutwari	68	1	9
4. Government Revenue for the village ...	143	8	6
Total Rs. ...	498	15	0

The lower Court upon this finding held that before the plaintiffs could sue for redemption as puisne mortgagees they were bound to pay up not only the principal sum of Rs. 8,000, but also this additional sum of Rs. 498-15-9 which I have mentioned above; and that Court also directed that the expenses incurred by the plaintiffs should be recovered from the defendants.

From this decree this first appeal has been preferred by the plaintiffs; and the main contention which has been pressed upon us by Mr. *Banerji* is that the decree of the lower Court is wrong in so far as it renders the decree for redemption subject to the payment of the aforesaid sum of Rs. 498-15-9. In supporting the appeal the learned counsel relies upon the terms of the mortgages of the 27th August, 1883, and he contends that inasmuch as those mortgages did not mention anything expressly as to the payment of any sum of money due over and above Rs. 8,000, which was the amount of the principal mortgage-money, therefore the payment

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of this additional sum could not be made a condition precedent to a decree for redemption.

I am of opinion that this contention is unsound. In the first place, so far as the first three items above mentioned by me are concerned there is a distinct clause in the mortgages of the 27th August, 1883, which entitles the mortgagees to claim the arrears of rent as a part and parcel of the mortgage-money, or, to say the least, such arrears of rent (to use the words of the deed itself), as would be found due from tenants at that time, became in fact part and parcel of the mortgage-money itself, and the decree of the Court below was sound.

As to the 4th item, the Government revenue amounting to Rs. 143-8-6, it is true that this sum was a sum paid by the mortgagees in respect of arrears of revenue antecedent to the 27th August, 1883, but the revenue fell due after this mortgage. It is clear that unless this revenue was duly paid not only would the mortgagees lose their rights but the mortgagors themselves would also cease to have any right in the property; because arrears of revenue may result in a sale such as would put an end to all the rights, not only of the first mortgagees, as well as of the second mortgagees, but also to the mortgagors' rights. Under these circumstances, though the terms of the mortgage-deed of the 27th August, 1883, are silent upon the point, yet the general law upon which the doctrine of salvage and subrogation proceeds, and the principles of which have been uniformly adopted by the Courts of India, lays down that persons in the position of the present defendants as mortgagees in possession are entitled to claim that sum before the property which they saved from sale for arrears of revenue, could be redeemed. Such a right no doubt cannot be exercised by a person not interested in the property. But here there is no question that these two mortgages gave to the defendants in this action such interest in the property as would entitle them to spend the money to save that property.

It is not necessary to decide whether this particular case is governed by the specific rules contained in the Transfer of Property Act, because I am of opinion that the rules contained in s. 72 of that enactment only reproduce the doctrines which the Courts of

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justice in India have uniformly adopted, and it reproduces the older law. Clause (*b*) of s. 72, read with the earlier part of the section, enacts:—"When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—(*b*) for its preservation from destruction, forfeiture or sale"; and the antepenultimate paragraph of that section goes on to say he "may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of 9 per cent. per annum." So far as the question of the rate of interest is concerned, it is not necessary to determine it; because no interest is claimed upon Rs. 143-8-6 paid as arrears of revenue. But I hold that the principle to which I have alluded entitles the defendants-mortgagees to make that a part and parcel of the mortgage-money, the payment whereof should be a condition precedent before they are ousted from the mortgaged property.

Under these circumstances I am of opinion that this appeal No. 101 of 1887 fails and should be dismissed.

(The learned Judge then proceeded to dispose of the connected appeal, preferred by the defendants, and to dismiss the same, ordering that both appeals should be dismissed without costs of the High Court.)

STRAIGHT, J.—I entirely concur.

Appeals dismissed.

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June 15.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

KAURI THAKURAI (DEFENDANT) *v.* GANGA NARAIN LAL AND OTHERS (PLAINTIFFS).*

Landholder and tenant—Agreement by occupancy tenant to relinquish his holding—Agreement not enforceable—Suit for specific performance of agreement—Jurisdiction of Civil Courts.

The defendant, who was a tenant with a right of occupancy in the land cultivated and held by him, executed a *kabuliat* in respect of the said land in favour of the plaintiffs (his landlords), agreeing that on the expiry of the term fixed in the *kabuliat* he should have no claim to retain possession of the cultivatory holding, but that he should give it up. Plaintiffs sued for ejectment of the defendant on the basis of the

* Second Appeal No. 62 of 1887 from a decree of Maulvi Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 10th December, 1886, reversing a decree of Maulvi Ahmad Husain, Munsif of Bansgaon, dated the 21st August, 1886.

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agreement, and obtained a decree from the lower appellate Court. On second appeal by the defendant.

Held that inasmuch as the plaintiffs sought to enforce the covenant contained in the *kabuliat* in such a manner as to extinguish the rights of occupancy found upon the facts of the case to have been acquired by the defendant in the land in suit, such suit must fail, as opposed to the policy of the law as shown in the provisions of s. 9 of the Rent Act (Act XII of 1881). Such a tenant may be ousted from his holding by enforcement of the remedies given in that behalf in s. 95(*d*) and (*f*), but not in the manner sought by the plaintiff in this action.

THE plaintiffs in this case were the zamindars of mauza Kahkaha in the district of Gorakhpur. The defendant was a tenant with rights of occupancy in certain land situate in the mauza. It appeared that previous to the mutiny in 1857, the defendant was admittedly a person who owned the mauza, but owing to his misconduct during the disturbances of the mutiny, his rights and interests in the mauza were confiscated by Government, and the proprietary rights therein came to the plaintiffs by right of purchase.

On the 29th June, 1874, the defendant executed a *kabuliat* in respect of the land in suit in which he agreed to relinquish it at the end of five years, the wording of the clause being to the following effect: "On the expiry of the term he (defendant) shall have no claim or excuse for retaining possession of the cultivatory holding, but he shall give it up." This *kabuliat* appears to have been preceded by a decree of the Revenue Court passed in 1870 in favour of the plaintiffs ordering ejectment of the defendant from the land in suit, but there was no evidence to show that the defendant had ever been ejected; on the contrary he continued to pay rent to the plaintiffs and remained their tenant, till at the last settlement he got his name recorded as a tenant with rights of occupancy in respect of the land in suit. The plaintiffs then brought this suit in the Court of the Munsif of Bansgaon for possession of the land, basing their claim on the agreement contained in the aforesaid *kabuliat*.

The defendant contended that the suit was not cognizable by the Civil Court; that he had been in continuous possession of the land for more than 12 years, and had thereby acquired rights of occupancy in the land in suit, and that the agreement in the *kabuliat* to surrender the land after five years was void in law.

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The Munsif, holding that the suit was cognizable in the Civil Courts, dismissed it on the ground that the agreement in effect was a transfer of the defendant's rights of occupancy, and that as such a transfer was prohibited by s. 9 of the Rent Act (XII of 1881), the agreement was not enforceable. On appeal by the plaintiffs the Subordinate Judge gave them a decree, holding that the agreement did not operate as a transfer of the right of occupancy, and was enforceable at law. He referred to *Lalji* v. *Nuran* (1).

The defendant appealed to the High Court.

The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellant.

Munshi *Madho Prasad*, for the respondents.

BRODHURST and MAHMOOD, JJ.—The plaintiffs in this case are admittedly the zamindars of the land in suit, and the defendant, Kauri Thakurai, is admittedly a person who formerly owned the village, and was in cultivation of certain lands, when, in consequence of his misconduct during the disturbances of the mutiny of 1857, his rights and interests in the village were confiscated by Government, and the proprietary rights came by purchase to the plaintiffs.

The plaintiffs came into Court alleging that a few years after the confiscation the defendant-appellant was ousted, and that, by an agreement or *kabuliat*, dated the 29th June, 1874, executed by the defendant, the latter agreed to cultivate those lands for a period of five years, and in executing that document entered into a covenant that after the lapse of five years he, the defendant, would vacate the land.

It appears from the judgment of the lower appellate Court that the agreement or *kabuliat* continued, and the defendant remained upon the land as a tenant paying rent to the plaintiffs. The *kabuliat* above mentioned appears from the same judgment to have been preceded by a Revenue Court's decree, passed in 1870, for ejectment of defendant; but, as Mr. *Ram Prasad* for the appellant states, there is not a particle of evidence to show that the decree for ejectment was executed, or that the defendant was ousted from the land in suit. On the other hand, it is conceded that he

(1) I. L. R., 5. All., 103.

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continued to pay rent to the plaintiffs, and, for all purposes, to occupy the *status* of a tenant towards the landlord.

The plaintiffs appear to have made an application to the Revenue Court in respect of the mutation of names, with the object of having it recorded that the *status* of the defendant was not that of an occupancy-tenant, but only that of a tenant-at-will. On the 24th December, 1885, it was decided by the settlement officer that the defendant's position was that of a tenant with a right of occupancy, inasmuch as he had cultivated the land continuously for a period exceeding twelve years, and that decision was upheld by Mr. LaTouche, as the Court of appeal, on the 14th April, 1886. In that judgment it was found that "the parties admitted the *status* of the defendant to be that of an occupancy-tenant, he having cultivated the land for more than twelve years."

The present suit was begun on the 10th June, 1886, in the Civil Court by the plaintiffs-zamindars, with the object of enforcing the covenant contained in the *kabuliat* of the 29th June, 1874, whereby the defendant had covenanted, in taking the lease, that he would vacate the land at the end of five years. Some argument has been addressed to us as to whether or not such a suit was one cognizable by a Court of civil jurisdiction as distinguished from a Rent Court, within the meaning of s. 95 of the Rent Act (XII of 1881). Mr. *Ram Prasad* argued that the nature of the suit was such as was contemplated by clauses (*d*) and (*f*) of s. 95 of Act XII of 1881, but we are of opinion that this contention is unsound, because here the nature of the prayer in the plaint was not that of ejectment, but it was a prayer which required consideration whether the covenant contained in the *kabuliat* of the 29th June, 1874, could be regarded as valid. The suit was therefore of a civil nature, and in this view we are supported by the ruling in *Lalji* v. *Nuran* (1), to which the lower appellate Court has also referred.

The same ruling has, however, been understood by the lower appellate Court as justifying the conclusion that because the present defendant in executing the *kabuliat* of the 29th June, 1874, promised to vacate the land at the end of five years from that date, therefore he should be so ejected. One of us was a party to that

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judgment, and, reading the ruling as we do, we are of opinion that the case is no authority for maintaining that where a person already possessing a right of occupancy promises to vacate the land at some future period (in this case it was five years), such action is to be regarded as a contract of relinquishment. All that the case laid down was that an occupancy-tenant, or indeed any kind of tenant, could, if he pleased, leave the land alone and relinquish it so as to render the right of the landlord available to him for the purpose of securing the cultivation of the land.

Here it was admitted before the settlement officer by the respondents in the case to which reference has already been made, that the defendant was an occupancy-tenant at the time when the *kabuliat* of the 29th June, 1874, was executed. Such right no doubt depends on continuous cultivation extending beyond twelve years, and in giving rise to the right the provisions of s. 6 of the old Rent Act (X of 1859) were no doubt applicable. But at the time when the *kabuliat* was executed, namely, the 29th June, 1874, there existed the Rent Act (XIII of 1873), the policy of which enactment was to prevent the extinction of occupancy-tenure, so much so that s. 9 of the enactment, reproduced in Act XII of 1881, prohibited transfer of such tenures; or, in other words, continued the right of occupancy to one who would hold on to the land and continue to cultivate it.

This is not therefore a case in which there has been any actual relinquishment of the tenure by the defendant, because, as a matter of fact, he has not relinquished the tenure. This is not a case in which the relation of landlord and tenant between the parties is denied by either of the parties to the litigation. This is a case in which the right of landlord and tenant being admitted, the plaintiffs seek to enforce the covenant contained in the *kabuliat* of the 29th June, 1874, in such a manner as to extinguish the rights of occupancy which are found, upon the facts of the case, to belong to the defendant.

In our opinion such a suit cannot prevail. The policy of the law was to make occupancy-tenures firm, to give fixity of tenure to those who had cultivated the land for a period exceeding twelve years, and there are provisions in the Rent Act of 1859, as also

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in the Rent Act of 1873 and again in the present Rent Act of 1881, which go to show that such tenures are regarded with care by the Legislature, and that the ouster of persons having rights of occupancy is not to be allowed even where persons having such rights promise to relinquish the land under an agreement such as that of the 29th June, 1874. The Court therefore could not have enforced the ejectment of the defendant. The Court of first instance was therefore right in dismissing the claim as to the enforcement of the forfeiture clause of the *kabuliat* of the 29th June, 1874.

Mr. *Madho Prasad*, in defending the appeal, has asked us to remand the case for trial of the specific question as to whether or not the decree of 1870 was ever executed, and as to the various questions arising from it, with reference to the rights which the plaintiffs as zamindars may have in connection with the land and against the defendant-appellant. We are of opinion that the relation of landlord and tenant being admitted, proved, and shown in the case, and also the *kabuliat* of the 29th June, 1874, upon the ground of which alone such a suit could be maintained in the Civil Court, the remaining questions as to whether the defendant could be ousted is a matter, not for the Civil Court to determine, but for the Rent Court to deal with. There may be such remedies as clauses (*d*) and (*f*) of s. 95 of Act XII of 1881 contemplate, and those remedies may still be open to the plaintiffs-respondents. They may, having admitted the defendant to be their tenant, either seek to enhance the rent, or seek to recover payment of such rent, or upon failure of such payment to enforce a decree for ejectment. These are questions for the Rent Court and not for the Civil Court, and we are not concerned with them. The result of this view is to decree the appeal, and reversing the decree of the lower appellate Court to restore that of the Court of first instance with costs in all the Courts. We order accordingly.

Appeal allowed.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

1888
June 18.

UPMANI KUAR (PLAINTIFF), *v.* RAM DIN AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Clause fixing price in case of sale to a co-sharer—Agreement running with the land—Pre-emptor entitled to take property on payment of price fixed in wajib ul-arz.

The pre-emptive clause in the *wajib-ul-arz* of a village contained the provision that the right of pre-emption could be enforced on payment of such sum as would represent the "*kimat-i-muravvajah*," that is, according to current rates. A suit for pre-emption was brought against the vendor and vendee of a certain fractional share in the village, and the plaintiff claiming the benefit of the above provision disputed the price entered in the sale deed as the proper price for the share according to current rates.

Held, following *Karim Bakhsh Khan* v. *Phula Bibi* (1), that a co-sharer was entitled to purchase the share sold at a price to be ascertained according to the rule in that behalf contained in the *wajib-ul-arz*, and the condition in the *wajib-ul-arz* regarding the price to be paid for the share sold was binding on the land and therefore binding on the stranger vendee.

THE plaintiff in this case, Musammat Upmani Kuar, and the defendant, Khurshed Jahan, were co-sharers of the village Mukhapur in the district of Azamgarh. The defendant, Khurshed Jahan, by a sale-deed dated the 21st May, 1885, sold a nine pies share in the village to the other defendants Ram Din and two others for the sum of Rs. 825, which was entered in the sale-deed as the price. The covenant of the village *wajib-ul-arz* relating to enforcement of the right of pre-emption contained the following provision for assessment of the price, *viz.*, that the right of pre-emption could be enforced on payment of such a sum of money as would represent the "*kimat-i-muravvajah*," that is, price according to current rates. The plaintiff instituted this suit to enforce his right of pre-emption in respect of the share sold by the defendant, Khurshed Jahan, and contended that the price entered in the deed of sale, *viz.*, Rs. 825, was fictitious and that the same should be calculated with reference to the rule for ascertaining the price as laid down in the pre-emptive clause in the *wajib-ul-arz*, and he maintained that Rs 350 would be the real price.

The Munsif of Azamgarh, finding that the plaintiff had failed to prove either that the market value of the property was only

* Second Appeal No. 252 of 1887 from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 30th November, 1886, confirming a decree of Munshi Nehal Chand, Munsif of Azamgarh, dated the 16th July, 1886.

(1) I. L. R., 8 All., 102.

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Rs. 350 or less than Rs. 825, accepted the latter sum as the "correct amount of the consideration money," and accordingly decreed the claim for pre-emption in favour of the plaintiff, subject to payment of Rs. 825.

The plaintiff appealed to the District Judge of Azamgarh, who dismissed the appeal. The main part of his judgment was as follows:—

"The lower Court did not hold the wording of the *wajib-ul-arz* as binding upon the parties; and I agree in this view of the lower Court; besides this, there is no reliable evidence that only Rs. 350 were paid, so if plaintiff wishes to buy the property, she must do so for Rs. 825."

The plaintiff appealed to the High Court, and contended that the lower Court had erred in law in not adopting the rule laid down in the *wajib-ul-arz* for ascertaining the price.

The facts of the case are further stated in the judgment of the Court.

Mr. *Abdul Majid* and Munshi *Madho Prasad*, for the appellant.

Pandit *Moti Lal* (for Munshi *Jwala Prasad*), for the respondents.

MAHMOOD, J.—The property to which this litigation relates is a nine pies share in mauza Makhapur, of which the plaintiff and the defendant, Khurshed Jahan, were co-sharers. On the 21st May, 1885, Khurshed Jahan executed a sale-deed in favour of Ram Din and other defendants, whereby he sold the above mentioned nine pies share for a price which is stated in the sale-deed to be Rs. 825.

The plaintiff thereupon instituted this suit to enforce her right of pre-emption in respect of the above mentioned sale, and in her claim she alleged that the sum of Rs. 825 had fraudulently and collusively been entered in the sale-deed to defeat her right of pre-emption; that the price actually paid was only Rs. 350; that according to the pre-emptive clause of the *wajib-ul-arz* of the village the right of pre-emption could be enforced on payment of such sum of money as would represent the "*kimat-i-muravvajah*," that is, price according to current rates; that such current rate was to calculate the price at 8 annas per cent. profit; and to support her

contention she produced a *bujharat* of 1292 fasli, showing that the annual profits of the nine pies share amounted to Rs. 21-1-8.

The suit was resisted by the vendor, Khurshed Jahan, defendant, on the allegation that he sold the property for Rs. 825 after the plaintiff had refused to purchase the share. Ram Din and others, vendees-defendants, took the same plea, and they further pleaded that the market value of the property in suit was Rs. 825, which they had paid as the consideration of the sale.

The Court of first instance held that refusal by the plaintiff to purchase the property was not proved; that the plaintiff had failed to prove either that the market-value of the property was only Rs. 350 or less than Rs. 825; that this last sum must, therefore, be taken as the "correct amount of the consideration-money and the same should be paid by the plaintiff." The Court accordingly decreed the claim for pre-emption subject to payment of Rs. 825.

From this decree the plaintiff appealed to the lower appellate Court upon grounds which impugned the judgment of the first Court as to the amount of purchase-money and the principle upon which it should be calculated. The learned Judge of the lower appellate Court dismissed the appeal, and the main part of his judgment is thus worded:—

"The lower Court did not hold the wording of the *wajib-ul-arz* as binding upon the parties; and I agree in this view of the lower Court; besides this, there is no reliable evidence that only Rs. 350 were paid, so if plaintiff wishes to buy the property, she must do so for Rs. 825."

The plaintiff has preferred this second appeal, contending that in determining the price of the property in suit the lower appellate Court has erred in not following the terms of the *wajib-ul-arz* as to the "*kimat-i-muravvajah*" or the current rate; and that that Court has omitted to decide the exact amount of the price actually paid for the property in suit.

Mr. *Abdul Majid*, in supporting the appeal, has confined his argument to these two points, and contends that the decision of the lower appellate Court must be taken to proceed upon the preliminary point that the terms of the *wajib-ul-arz* as to the assessment of the price were not binding upon the parties, and that

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therefore that Court has not tried the case upon the merits. On the other hand, Mr. *Moti Lal*, who appears for Mr. *Jwala Prasad*, on behalf of the respondents, argues that the judgment of the lower appellate Court must be read so as to incorporate the findings and conclusions of the first Court, and so read, the case must be treated as having been tried upon the merits, leaving no room for second appeal.

I am of opinion that the appeal has force and that the case has not been tried upon the merits by the lower appellate Court, as that Court's judgment proceeds upon the view that the terms of the *wajib-ul-arz* as to the assessment of the price for pre-emptive purposes were not binding upon the parties. The question is no doubt one not altogether free from difficulty, when regarded as a general question of law, whether such covenants run with the land so as to bind purchasers who may or may not have notice of such covenants. The covenant may amount only to an obligation annexed to the ownership of immoveable property, but not amounting to an interest therein, and in this light the covenant would fall under the class of obligations which have been well described in the second paragraph of s. 40 of the Transfer of Property Act (IV of 1882), or, to use the language of jurisprudence, the right created by such a covenant would fall under the category of *jus ad rem* as distinguished from *jus in rem* : and if it be so, then the equitable doctrine of notice would come into play in dealing with such questions where *bonâ fide* transferees for value are concerned.

I am, however, relieved from entering into this somewhat difficult question by a long course of decisions in respect of such covenants when found in the pre-emptive clause of the *wajib-ul-arzes* in these Provinces. In *Chotey* v. *Bulla* (1), *Hakeem Maher Ali v. Premsookh* (2) and *Balesur Aheer* v. *Pudurut Singh* (3), the late Sadar Diwani Adalat of these Provinces laid down the rule that a condition in the *wajib-ul arz* securing to co-sharers a right of pre-emption at a fixed sum per bigha, without reference to the actual price paid by a stranger, however unusual and inexpedient, must be enforced, when its enforcement is claimed by a co-sharer. In laying down this rule the learned Judges do not seem to have

(1) N.-W. P. S. D. A. Rep., 1865, part i, p. 163.
(2) N.-W. P. S. D. A. Rep., 1865, part i, p 305.
(3) N.-W. P. S. D. A., 1865, part ii, p. 104.

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considered how far the doctrine of notice would affect the question when raised against *bonâ fide* transferees for value, and I can well imagine why in *Akbar Singh* v. *Jaala Singh* (1), in dealing with a similar covenant, my brothers Straight and Tyrrell confined the effect of such covenants only to disputes as to price between the pre-emptor and the vendor, and would not extend the effect of such covenants to *bonâ fide* purchasers for value.

The case-law stood thus when a Full Bench of this Court in *Karim Bukhsh* v. *Phulo Bibi* (2) had to consider the same question, and they unanimously arrived at the conclusion that covenants in the *wajib-ul-arz* as to the assessment of price for purposes of pre-emption run with the land so as to bind purchasers, that a pre-emptor co-sharer could enforce such a covenant both against the vendor and the vendee, and that if the stranger vendee had paid more than was payable according to the *wajib-ul-arz*, he was entitled to recover the surplus from the vendor. In delivering his judgment in that case my brother Tyrrell distinguished the ruling in *Akbar Singh* v. *Jaala Singh* (1) to which I have already referred, and he adopted the Full Bench ruling in *Hasrat Khan* v. *Jeobadh Upadhia* (3), which is, so far I am aware, the latest ruling on the subject.

In none of the cases to which I have referred (and I am not aware of any other ruling) does the exact nature of the right created by covenants in the *wajib-ul-arz* as to the assessment of price for pre-emptive purposes appear to have been either argued or considered, with reference to the applicability of the equitable doctrine of notice to *bonâ fide* transferees for value, nor does it appear that the question how far such covenants are enforceable in law as opposed to public policy in consequence of derogating from the value of immoveable property was considered or decided; and I confess that if the matter was *res integra* I should have considered it my duty to have considered these points before giving such unqualified effect to covenants as to price contained in the *wajib-ul-arz* as against transferees for value, the more so as I cannot help feeling that such covenants are opposed to the very nature of the right of pre-emption.

(1) Weekly Notes, 1885, p. 216. (2) I. L. R., 8 All., 102.
(3) Weekly Notes, 1887, p. 76.

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The matter, however, as I have shown is not *integra* and the balance of authority of the case law which culminated in the Full Bench ruling of this Court in *Karim Bakhsh Khan* v. *Phula Bibi* (1) is entirely in favour of the appellant's case, for it goes the length of holding that irrespective of notice such covenants in the *wajib-ul-arz* run with the land and are enforceable against *bonâ fide* purchasers for value, whose only remedy is to recover the surplus from the vendor, that is, such money as may have been paid by the vendee over and above the price assessed according to the *wajib-ul-arz*. The ruling is binding upon us, and in accordance therewith I hold that the learned Judge of the lower appellate Court was wrong in law in holding that the terms of the *wajib-ul-arz* as to the enforcement of pre-emptive right on payment of price at the current rate was not binding upon the parties, and that he should have tried the case upon the merits with reference to the terms of the *wajib-ul-arz* above mentioned. In other words, he should have gone fully into the merits of the whole case in order to ascertain the exact current rate at which such property is sold. The circumstance that the defendants-vendees paid any particular sum as the price of the property may no doubt form an element of consideration as to the exact market-value of the property with reference to the current rate at which such property is sold. But according to the Full Bench ruling above mentioned, the circumstance that the defendants-vendees actually paid Rs. 825 or even a lesser sum, as the price of the property, would not *per se* render the decree for pre-emption subject to payment of the price actually paid.

The lower appellate Court has not tried the case upon the merits with reference to these considerations, and under the circumstances I would decree this appeal, and setting aside the decree of the lower appellate Court, remand the case to that Court for trial upon the merits. Costs to abide the result.

BRODHURST, J.—For the reasons stated by my brother Mahmood I concur with him in allowing the appeal, in setting aside the decree of the lower appellate Court, and in remanding the case to that Court for trial upon the merits.

Cause remanded.

(1) I. L. R., 8 All., 102.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

1888
June 29.

WALI-UL-LAH KHAN AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD ISRAR-UL-LAH KHAN AND OTHERS (PLAINTIFFS).*

Practice—Issue raised by Court which was not raised by parties.

The plaintiffs in a suit denounced in the plaint their two signatures to a sale-deed as forgeries, and never alleged that they witnessed it under pressure. The Court of first instance found them to be genuine, and the lower appellate Court, while agreeing with the Court below in its findings upon the question of the genuineness of the signatures, observed that they were obtained under pressure, and so reversed the decree of the Court below. On second appeal to the High Court,

Held that Courts are not to raise important and serious issues in a case for the parties when they have not raised it themselves by their own pleadings in the cause.

SALAMAT-ULLAH Khan, Wali-ullah Khan, and Sakhawat-ullah Khan were three brothers owning jointly several zamindari villages and other lands and houses. By a partition and division between the brothers by means of an arbitration award, all their joint property was divided between them, and each brother became separate and undivided owner of the zamindari village land and houses allotted to him, and the award further provided that in case of sale or transfer by any of the parties of the property so acquired by him in severalty, the other parties should have a right of pre-emption. By this partition mauza Bahori, tahsil Pawayan, was allotted to Wali-ullah Khan, the defendant, and his name was recorded in the revenue papers as proprietor of the said mauza.

By a sale-deed dated the 6th March, 1885, Wali-ullah Khan conveyed 5 biswas out of the entire 20 biswas of the said mauza and another plot of land which he also held in severalty, to Muhammad Iftikhar-ullah Khan in the sum of Rs. 2,000, and the plaintiffs, who each the sons of Salamat-ullah Khan, signed the deed as witnesses.

The plaintiffs then brought this action to enforce their right of pre-emption in respect of the aforesaid sale, alleging also at the same time that they were not among the witnesses to the sale-deed and that the signatures purporting to be theirs on the deed were not genuine.

The defendants contested the suit on various grounds, and maintained that the signatures on the sale-deed purporting to be those of the plaintiffs as witnesses thereto were genuine.

* Second Appeal No. 1643 of 1886 from a decree of H. P. Mulock, Esq., District Judge of Shahjahánpur, dated the 26th July, 1886, reversing a decree of Maulvi Mirza Abid Ali Khan, Subordinate Judge of Shahjahánpur, dated the 11th March, 1886.

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The Subordinate Judge of Sháhjahánpur, who tried the suit in the first instance, fixed several issues for determination arising out of the material allegations of the parties, and one of them was, "Were the signatures to the sale-deed affixed by the plaintiffs themselves, or had the defendants forged them without the knowledge of the plaintiffs, and how will these signatures affect them?" Finding in favour of the defendants upon this issue as well as on the several other issues in the case, he dismissed the suit. On appeal by the plaintiffs to the District Judge, that officer upon this particular issue found as follows:—"I also agree with the Subordinate Judge that the plaintiffs did really sign the deed of sale or gift, or whatever it may be considered to be. It has been held—*Rajlakhi Debi* v. *Gokul Chandra Chowdhry* (1), that the mere attestation of a deed of sale by a relative does not necessarily import his concurrence. In this case the defendant, uncle of the plaintiffs, no doubt used his family influence to obtain the signature of the plaintiffs to his deed of sale, and I see every reason to believe that such signatures were obtained under compulsion and with no real intention or concurrence in the transaction or of waiver of any right. The plaintiffs did not intend to surrender any right when they signed the deed, and it was simply, to my mind, to relieve themselves from the importunities of their uncle that they affixed their signatures to the deed." On the other issues in the case he found in favour of the plaintiffs and decreed their claim, but without costs.

On second appeal to the High Court by the defendants, it was contended, among other things, that the finding of the District Judge, that the plaintiffs signed the sale-deed as witnesses under compulsion, was opposed to their own statement in their plaint wherein they denounced their signature as forgeries.

Mr. *G. E. A. Ross*, the Hon. Pandit *Ajudhia Nath*, and Mir *Zahur Husain*, for the appellants.

The Hon. *T. Conlan* and Mr. *W. M. Colvin*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This is a pre-emption suit. The plaintiffs, who claim a right of pre-emption, had signed the sale-

(1) 3 B. L. R., P. C., 57; 12 W. R., P. C. 47; 13 Moo. I. A., 209.

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deed as witnesses. As to that part of the case their allegation in the plaint was that they had not signed the sale-deed, and that their signatures were forgeries. The Subordinate Judge and the District Judge found that the signatures of the plaintiffs to the sale-deed were their genuine signatures. The Subordinate Judge found that the plaintiffs knew to what the sale-deed related, and he dismissed the suit. The District Judge allowed the appeal on the finding that the plaintiffs had witnessed the deed in question under pressure. There was no such issue raised on the pleadings in the case, and no such issue was before the District Judge. The simple issue on this point was—were those signatures the genuine signatures or not of the plaintiffs? The plaintiffs did not allege in their plaint that they had signed the sale-deed under pressure or that they did not know what the contents of the sale-deed were. The issue which the District Judge found in their favour was a very serious issue, and of that class of issues, which, in our opinion, the Privy Council has more than once pointed out, should not be raised by the Judge for the parties when they had not raised it themselves. In the Privy Council case referred to by the District Judge—*Rajlakhi Debi* v. *Gokul Chandra Chowdhry* (1), the mere proof of the signature of a witness to the document was, we think properly, if we may say so, held to be no evidence that he knew what the contents of the document were. On the findings on the issue raised by the parties by their pleadings, to which we have referred, the plaintiffs had no cause of action. The appeal is allowed, and the suit is dismissed with costs.

Appeal allowed.

1888
July 16.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

ZALIM GIR (DEFENDANT) v. RAM CHARAN SINGH (PLAINTIFF).*

Mortgage—Payment by mortgagee by conditional sale of prior mortgage—Decree obtained by intermediate simple mortgagee for sale—Mortgage by conditional sale foreclosed—Intermediate simple mortgagee not entitled to sell without paying first mortgage.

B made two mortgages, dated respectively the 10th October, 1871, and 10th October, 1872, of his zamindari property in favour of *P*. On 27th January, 1874, *B*

* Second Appeal No. 339 of 1887 from a decree of G. J. Nicholls, Esq., District Judge of Gházipur, dated the 31st January, 1887, reversing a decree of Munshi Kulwant Singh, Subordinate Judge of Gházipur, dated the 1st April, 1884.

(1) 3 B. L. R., P. C., 57; 12 W. R., P. C., 47; 13 Moo. I. A., 209.

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mortgaged 117 bighas 7 biswas and 10 dhurs of *sir* and cultivatory land belonging to his zamindari for Rs. 700 to the defendant. On 10th September, 1877, *B* made a conditional sale of his zamindari property to the plaintiff for Rs. 4,500 to pay off the two charges created in favour of *P*. On the 10th August, 1878, *B* made another mortgage to the defendant for Rs. 300 of the same 117 bighas, 7 biswas and 10 dhurs. On the 9th November, 1881, defendant obtained a decree on his two bonds of the 27th January, 1874, and 10th August, 1878, and on his application for execution of the decree the property mortgaged to him was advertised for sale on the 20th November, 1883. Meanwhile the plaintiff had taken the necessary proceedings to foreclose his conditional sale, and upon the 19th March, 1883, the sale was foreclosed. On the 19th November, 1883, plaintiff instituted this suit with the object of having it declared that defendant was not entitled to bring to sale the property mortgaged to him.

Held that by the conditional sale, which became absolute upon the 19th March, 1883, the plaintiff acquired all the rights that subsisted under the two mortgages of the 10th October, 1871, and 10th October, 1872, and was entitled to press those securities in his aid as prior incumbrances to that of the defendant, for the purpose of stopping him from bringing the property to sale in execution of his decree before first recouping the plaintiff the amount which the latter found to satisfy and discharge those incumbrances.

Held further that the only right which the defendant had to bring the property to sale was upon the strength of the decree obtained in the bond of 27th January, 1874, for he had no right under the instrument in his favour of the 10th August, 1878. The defendant should therefore only be permitted to bring the property to sale under his decree in respect of the mortgage of 27th January, 1874, when he had satisfied and discharged the two mortgage bonds held by the plaintiff of the 10th October, 1871, and 10th October, 1872.

The facts of this case are stated in the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Mr. *C. H. Hill* and Munshi *Juala Prasad*, for the respondent.

STRAIGHT, J.—It is impossible that I can allow this litigation to linger longer in the Court. The suit was instituted as far back as November, 1883, and we are now dealing with it, after a second trial in the lower appellate Court, in the month of July, 1888. The controversy between the parties was not of a specially complicated character, and if certain unnecessary elements had not been introduced into it by the lower Court, it might have been very readily and easily disposed of. Stripped of the complications that have been introduced into it, the case simply comes to this :—

On the 10th October, 1871, and the 10th October, 1872, one Bhairo Singh made two mortgages for money advanced to him in favour of one Panna Lal, and as security for those advances he

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hypothecated his zamindari property. On the 27th January, 1874, Bhairo Singh mortgaged 117 bighas 7 biswas and 10 dhurs of *sir* and cultivatory land belonging to his zamindari for a sum of Rs. 700 to Zalim Gir, the defendant-appellant before us. On the 10th September, 1877, Bhairo Singh made a conditional sale in favour of Ram Charan Singh, the plaintiff-respondent before us, for a sum of Rs. 4,500. The necessity for the taking of that loan, as recited in the deed of conditional sale, was a pressing obligation upon Bhairo Singh, the borrower, to pay off the two charges created in favour of Panna Lal on the 10th October, 1871, and the 10th October, 1872. On the 10th August, 1878, Bhairo Singh made another mortgage for Rs. 300 of the same 117 bighas 7 biswas and 10 dhurs to Zalim Gir, the defendant-appellant before us.

Subsequently Zalim Gir brought a suit upon his two bonds of the 27th January, 1874, and the 10th August, 1878, against his mortgagor, and on the 9th November, 1881, he obtained a decree for Rs. 2,064-14. Zalim Gir applied for execution of his decree and the mortgaged property was advertised for sale, the 20th November, 1883, being fixed for the sale. Meanwhile Ram Charan Singh, the plaintiff-respondent, had taken the necessary proceedings to foreclose his deed of conditional sale; and upon the 19th March, 1883, the sale was foreclosed and he became the absolute proprietor of the mortgaged property, which included within it the 117 bighas 7 biswas and 10 dhurs which had been charged in favour of the defendant-appellant. The defendant-appellant having, as I have already said, notified the mortgaged property for sale, and the 20th November, 1883, having been fixed for such sale, the present suit was instituted on the 19th November, 1883, the day before the sale, with the object, to put it shortly, to have it declared that Zalim Gir was not entitled to bring the property to sale.

It is unnecessary for me to travel through the judgments delivered, first by the Court of first instance, and next by the appellate Court when it had the case first before it, and on the last occasion when it had to re-try the appeal under our order of remand. It is enough to say that, in my opinion, we must now take it as found that by the conditional sale, which became absolute upon the 19th March, 1883, the plaintiff-respondent acquired all the rights that subsisted under the two mortgages of the 10th October, 1871,

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and 10th October, 1872, and he therefore is also in my opinion entitled to pray those securities in his aid as prior incumbrances to that of the defendant-appellant, for the purpose of stopping him bringing the property to sale in execution of his decree, unless he recoups the plaintiff for the amount which he (the plaintiff) found to satisfy and discharge those incumbrances.

It is clear that the only right, supposing he gets those incumbrances out of the way by satisfying and discharging them, which the defendant-appellant has is upon the strength of the decree obtained in reference to his bond of the 27th January, 1874, to bring the property to sale, because he can have no right whatever under the instrument which was made in his favour on the 10th August, 1878. It therefore seems to me that the proper course for us to pursue in this case is, while allowing this appeal, to modify the decree of the Court below by declaring that the defendant shall only be permitted to bring the property to sale under his decree in respect of his mortgage of the 27th January, 1874, when he has satisfied and discharged the two mortgage-bonds held by the plaintiff-respondent of the 10th October, 1871, and the 10th October, 1872. The order of the learned Judge will stand as to the costs of the lower Courts. In this Court each party will pay his own costs.

TYRRELL, J.—I entirely concur.

Appeal allowed.

Before Mr. Justice Straight.

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July 26.

GOPAL DAS (DECREE-HOLDER) *v.* ALI MUHAMMAD AND OTHERS (JUDGMENT-DEBTORS).*

Mortgage—Decree for sale—Decree not to be treated as a money-decree—Act IV of 1882 (Transfer of Property Act), ss. 88, 89, 90.

A decree in favour of a mortgagee for sale of the mortgaged property cannot be treated as one for money. According to the Transfer of Property Act, ss. 88, 89 and 90, the mortgagee must first sell the mortgaged property, and if the net proceeds of such sale be insufficient to pay the amount due for the time being on the mortgage, and if the balance be legally recoverable from the mortgagor otherwise than out of the property sold, he may ask the Court for a decree for such balance.

THE appellant in this case, a mortgagee who had obtained a decree against the mortgagors for the mortgage-money, costs, and

* Second Appeal No. 1606 from an order of T. R. Wyer, Esq., District Judge of Shâhjahânpur, dated the 23rd June, 1887, reversing an order of Munshi Chandi Prasad, Munsif of East Budaun, dated the 5th February, 1887.

interest, and for the sale of the mortgaged property, attached certain immoveable property of the mortgagors, respondents, other than the mortgaged property. The mortgaged property had not been sold at the time. The respondents objected that the decree-holder was not entitled to proceed against the property attached until the mortgaged property had been sold. This objection the Court of first instance allowed so far as to stay any further proceedings in respect of the attached property, and to direct the decree-holder to bring the mortgaged property to sale, but it maintained the order of attachment. On appeal by the judgment-debtors the lower appellate Court ordered that the attachment should be removed. The decree-holder appealed to the High Court.

Pandit *Moti Lal Nehru*, for the appellant.

Mr. *Amiruddin*, for the respondents.

STRAIGHT, J.—I think the learned Judge was right. The appellant decree-holder had obtained a decree on his mortgage-security for sale of the mortgaged property, and it was the business of the Court executing it to proceed in the manner directed by ss. 88, 89 and 90 of the Transfer of Property Act. In my opinion, the presumption should be that immoveable property which a mortgagee has accepted as adequate security for his loan to the mortgagor will, if sold, realise enough to satisfy his charge, and this view seems to me to be borne out by the sections of the Act referred to above, more particularly by the provisions contained in s. 90. I do not think under the law as it now stands, that a mortgagee with a decree for sale of the mortgaged property, the execution of which is now specially provided for in the Transfer of Property Act, can treat such decree as one for money, which entitles him to ask for attachment of the other property of his mortgagor judgment-debtor; on the contrary, what I think the statute means and says, is, that he must first sell the mortgaged property, and if it does not fetch enough to pay his charge, interest and costs, then he may ask the Court for a decree for the money balance, if it is recoverable personally from the defendant and his other property, and execute that in the ordinary manner as a money-decree is executed. I dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Straight.

August 6. MUSHARAF ALI AND ANOTHER (DEFENDANTS) *v.* IFTKHAR HUSAIN AND ANOTHER (PLAINTIFFS).*

Suit for removal of trees—Limitation—Act XV of 1877 *(Limitation Act), sch. ii, Nos.* 32, 120.

A suit by a zamindar for removal of trees planted in certain waste land of his village by persons who have no right to plant them, is governed by art. 120, schedule ii of the Limitation Act, and not by art. 32, schedule ii of the Act.

Where a defendant having a right to use property for a specified purpose perverts it to other purposes, and a suit has to be instituted for any relief in respect of any injurious consequences arising from such perversion, such a suit will be governed by art. 32, schedule ii of the Limitation Act.

Gangadhar v. *Zahurriya* (1) distinguished.

THE defendants had planted some trees on the waste land of the village of which the plaintiffs were the zamindars, and this suit was brought to have the trees removed. The defendant contended *inter alia* that the trees were planted with the consent or acquiescence of the zamindars, and that the claim for their removal was barred by limitation.

The lower appellate Court found that the trees in suit were not twelve years old; that the suit was not for recovery of land, and over-ruling the contention of the defendant that article 32, schedule ii of the Limitation Act governed the suit, gave the plaintiffs a decree for the removal of the trees.

The defendant appealed to the High Court, and contended upon the authority of *Gangadhar v. Zahurriya* (1), that the suit was governed by article 32, schedule ii of the Limitation Act.

Munshi *Ram Prasad*, for the appellants.

Mr. *D. Banerji*, for the respondents.

STRAIGHT, J.—It is admitted by the learned pleader for the defendants-appellants that the learned Judge has found in specific terms that the land upon which the trees have been planted by the defendants, of which act or acts the plaintiffs complain, is the waste-land of the zamindars, and accordingly the defendants had no rights in that land, which would justify them in so planting the

* Second Appeal No. 1498 of 1887 from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 26th April, 1887, modifying a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 15th April, 1886.

(1) I. L. R., 8 All., 446.

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trees. Mr. *Ram Prasad* has contended for the appellants that art. 32 of the Limitation Law applies to the present case, and in support of that view he has quoted the ruling of my brothers Tyrrell and Mahmood in *Gangadhar* v. *Zahurriya* (1).

It would be out of place for me to criticise that ruling if I disagreed with it, which I do not. But the facts of that case are totally distinct from the facts disclosed here. There, there was an undoubted right in the defendants, who were occupancy-tenants of the plaintiff's land, to use that land for certain specific purposes, and what the plaintiff complained of was that instead of using it as arable land, for which it had been let to them, they had converted it into a *bagh* or grove; consequently art. 32 was held to be applicable. Here the case is a totally different one. Upon the admission of the learned pleader for the appellants, the defendants had no right in this waste-land of the zamindars-plaintiffs under colour of which they could plant trees in the zamindars' waste; and except that they could have asserted any title by adverse possession for more than 12 years to the land, they could have acquired no right to plant trees therein. They have proved no such adverse proprietary title in the land, and all that they have sought to do, is to show that what they did, of which the plaintiffs complain, was done either with their direct leave or license or with acquiescence upon their part. Dealing with the point of limitation, I think that the learned Judge was right in applying art. 120 of the Limitation Law. The only question further that I have to determine is, when did the right to bring the suit accrue to the plaintiffs? Mr. *Ram Prasad* has not satisfied me that the plaintiffs' right to sue accrued more than six years prior to the date of the institution of the suit, and this view seems to have been held by the learned Judge in the Court below. That being so, I dismiss the appeal with costs.

Appeal dismissed.

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(1) I. L. R., 8 All, 446.

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ACKNOWLEDGMENT. *See* Act XV of 1877, s. 19, Explanation I., *and* Muhammadan Law (2).

ACTS—1859—VIII, s. 205. *See* Execution of decree (10).

————1860—XLV, s. 71. *See* Several offences.

————————, s. 170. *See* Several offences.

————————, s. 188. *See* Act X of 1872, s. 518.

————————, ss. 268, 290. *Slaughter of kine by Muhammadans on their own property—Public nuisance.*] A person wilfully slaughtering cattle in a public street, so that the slaughter could be heard and seen by the passers-by, would commit an offence punishable under s. 290 of the Penal Code.

But where certain Muhammadans, for a religious purpose, killed two cows before sunrise in a private compound partly visible from a public road, and the killing of one of the cows only was witnessed by one Hindu—*held* that the circumstances proved did not amount to the commission of a public nuisance as defined in s. 268 of the Code.

Muttumira v. *Queen-Empress* referred to.

Queen Empress *v.* Zakiuddin 44

————————, s. 295. *"Object" held sacred by any class of persons—Killing cows in a public place.*] The word "object" in s. 295 of the Penal Code does not include animate objects.

Queen-Empress *v.* Imam Ali 150

————————, ss. 380, 454—*Separate convictions and sentences. See* Criminal Procedure Code, ss. 35, 235 (1).

————————, s. 383. *See* Several offences.

————————, s. 498—(*Detaining with criminal intent married woman.*)] The words "such woman" in s. 498 of the Indian Penal Code do not mean such a woman as has been so enticed as mentioned in that section, but mean such woman as the accused knows or has reason to believe to be the wife of any other man; the detention of such a woman with the particular intent defined in the section is one of the offences made punishable under that section.

Empress *v.* Niadar 580

————1861—V, s. 29. *Act V of* 1861, *s.* 8—*Police Officer—Suspension—Breach of order.*)] A police constable was suspended and ordered to remain in the lines during suspension. Despite the order he absented himself therefrom without leave. He was convicted under s. 29 of Act V of 1861.

Held, s. 29 of Act V of 1861 contemplates that the person to be charged with an offence under it must have been, at the time of his doing the act in respect of which the charge is preferred, a police constable within the meaning of that Act. When a police officer is suspended, he ceases to be a police officer; the conviction was therefore wrong.

The Queen v. *Dinonath Gangooly* followed.

Queen-Empress *v.* Durga 459

————1865—X, ss. 256, 257. *See* Administration-bond.

————————XI, s. 6. *See* Small Cause Court suit.

————1868—I. s. 2 (6). *See* Registration.

————1869—IV, ss. 16, 17. *See* Dissolution of marriage.

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ACTS—1871—XXIII, ss. 3, 4, 6, 9—(*Grant of land revenue—Suit by assignees, zamindárs, for arrears—Right of plaintiffs admitted by Government—Suit not barred for want of Collector's certificate.*)] The sections of the Pensions Act (XXIII of 1871) restricting the jurisdiction of the Civil Courts to entertain suits relating to pensions of grants of money or land revenue must be construed strictly.

Held that a suit by the assignees from Government of land revenue, whose rights were admitted by Government, to recover arrears from persons admittedly liable to pay revenue to somebody, but who disputed plaintiffs' right thereto, came within section 9 of the Pension Act (XXIII of 1871) and was not barred by sections 4 and 6 by reason of no certificate having been obtained as therein provided.

Nagar Mal *v.* Ali Ahmad 393

———1872—I, s. 80. *See* Criminal Procedure Code, s. 509.

———, s. 92. (*"Between the parties."*) *See* Evidence.

———, s. 118. *See* Act X of 1873, ss. 6, 13.

———IX, s. 16. (*Voluntary transfer—Undue influence).* *See* Voluntary transfer.

———, s. 23. (*Act XXII of* 1881, *ss.* 5, 12, 35, 42—*License—Sub-lease—Breach of conditions of license).* *See* Act XII of 1881 s. 5.

———, s. 74, EXCEPTION. *See* Administration-bond.

———, *ss.* 124, 125—*Clause* (2). *See* Lease.

———, ss. 129, 131. *See* Lease.

———X, s. 518. *Duration of Magistrate's order—Criminal Procedure Code, s.* 144—*Act XLV of* 1860, *s.* 188.] In 1876 a Magistrate passed an order under s. 518 of Act X of 1872 (Criminal Procedure Code), directing the Sarnogis of Etah to take one of their annual religious processions along a particular route and at a particular hour. In 1886, in which year there was no fresh promulgation of the order, the Sarnogis took their procession along another route and at a different hour, and for so doing some of them were convicted and sentenced under s. 188 of the Penal Code.

Held that the conviction was wrong, the order of 1876 having a temporary operation only. *Gopi Mahun Mullick* v. *Turamoni Chowdhrani* referred to.

Queen-Empress v. Sheodin 115

———1873—X, ss. 6, 13. *Witnesses—Omission to take evidence on oath or affirmation.*] S. 6 of the Oaths Act (X of 1873) imperatively requires that no person shall testify as a witness except on oath or affirmation; and, notwithstanding s. 13 of the same Act, the evidence of a child of eight or nine years of age is inadmissible if it has been advisedly recorded without any oath or affirmation. *The Queen* v. *Sewa Bhogta* dissented from.

The nature of judicial oaths and affirmations and the history of Indian legislation on the subject discussed.

Queen-Empress *v.* Maru 207

———XIX, ss. 135, 241 (*f*). *See* Partition.

———1877—III, ss. 2, 17. *See* Registration.

———XV, ss. 5, 14. (*Admission of appeal beyond time—"Sufficient cause"—Appeal filed in wrong Court—*Bonâ fide *proceedings—Jurisdiction—Valuation of suit.*)] Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint in the cause. The valuation of the claim as preferred by the plaintiff, and not as set up by the plea in defence, would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation.

Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provisions of law, is not a

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sufficient cause within the meaning of s 5 of the *Limitation* Act for admitting the same appeal in the proper Court after the period of limitation prescribed therefor had expired.

To enable the Court to admit an appeal after the period of limitation prescribed therefor had expired, on the ground that the same had in the first instance been preferred within the period of limitation provided therefor but to a wrong Court, the appellant must satisfy that he made his appeal to the wrong Court *bond fide*, that is under an honest though mistaken belief, formed with due care and attention, that he was appealing to the right Court.

Jag Lal *v.* Har Narain Singh 524

ACTS—1877—XV, ss 5, 14. *Appeal preferred to wrong Court through mistake of law—Exclusion of time*] S. 14 of the Limitation Act (XV of 1877) does not contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law, the facts being fully apparent, but is limited to cases where from *bond fide* mistake of fact the suitor has been misled into litigating in a wrong Court The phrase "other cause of a like nature" in the section is vague, and cannot be held to release a person from the obligation to know the law of the land.

The decree in this suit was passed by the Subordinate Judge as the Court of first instance on the 31st March, 1886. Against the decree the plaintiffs preferred an appeal to the District Court on the 1st July, 1886, and on the 11th December, 1886, the District Court returned the memorandum of appeal filed in that Court to the plaintiff upon the ground that the subject-matter in dispute was above Rs. 5,000. The plaintiff then on the 20th December, 1886, presented the memorandum of appeal to the High Court, and it was admitted, subject to the consideration by the Bench determining the appeal of any question as to its admissibility, after the period of limitation prescribed for presentation of appeals to the High Court. Upon the hearing of the appeal, the respondent objected to the appeal being entertained, on the ground that it was presented beyond the period of limitation.

Held that no sufficient cause being shown for the delay in the presentation of the appeal, the appeal must be dismissed.

Balwant Singh v. *Gumani Ram* explained.

Ramjiwan Mal *v.* Chaud Mal 587

———————, s. 14. (*S 5—Admission of appeal beyond time—appeal filed in wrong Court.*) *See* s. 5.

———————, s. 19, EXPLANATION I. *Acknowledgment in writing*] In a suit upon a bond brought against the defendant as a principal debtor, an acknowledgment of liability as a surety only is sufficient to save limitation, with reference to s. 19, explanation I, of the Limitation Act (XV of 1877).

The Uncovenanted Service Bank, Limited *v* Grant ... 93

———————, s. 21. (*Acknowledgment signed by one of several partners.*)] The word "only" in s 21 of the Limitation Act (XV of 1877) is not to be treated as surplusage. It means that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partner, unless it can be shown that he had otherwise power to bind that partner for the purpose of making such acknowledgment, and in effect purported so to bind him.

Gadu Bibi *v.* Parsotam 418

———————, s. 23. *Bond—Interest post diem—Non-payment of principal and interest at agreed date—Limitation—Continuing breach—Act XV of 1877, sch. ii, Nos.* 115, 116.] Upon failure to pay the principal and interest secured by a bond upon the day appointed for such payment, breach of the contract to pay is committed, and there is no

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"continuing breach" within the meaning of s. 23 nor "successive breaches" within the meaning of art. 115 of the Limitation (Act XV of 1877).

Manaab Ali *v.* Gulab Chand 85

ACTS—1877—XV, Sch. ii, Nos. 32, 120. *Suit for removal of trees.*] A suit by a zamindar for removal of trees planted in certain waste land of his village by persons who have no right to plant them, is governed by art. 120, schedule ii of the Limitation Act, and not by art. 32, schedule ii of the Act.

Where a defendant having a right to use property for a specified purpose perverts it to other purposes, and a suit has to be instituted for any relief in respect of any injurious consequences arising from such perversion, such a suit will be governed by art. 32, schedule ii of the Limitation Act.

Gangadhar v. *Zahurriya* distinguished.

Musharaf Ali *v.* Iftkhar Husain 634

———————, Nos. 115, 116, *See* s. 23.

———————, No. 127. "*Joint family property*"—"*Exclusion*" *from such property.*] A Muhammadan family consisting of three brothers and their uncle jointly owned certain immoveable property which the uncle managed. Two of the brothers effected a settlement of accounts with the uncle, with reference to the profits of the state; the share of the three brothers was appropriated; and the money representing that share was deposited with the uncle. Subsequently the two who had effected the settlement withdrew their portion of the common share, and the third brother sued the uncle to recover a sum of money as his one-third portion. He alleged that he had been deceived by the defendant into supposing that his portion was included in the amount withdrawn by his brothers; but he did not base his suit upon any allegation of fraud. It was contended that art. 127, sch. ii, of the Limitation Act (XV of 1877) applied to the suit, limitation running from a date whereon the defendant had denied all liability in respect of the plaintiff's demand.

Held that the amount claimed could not, under the circumstances, be regarded as joint family property, that the defendant's denial of the plaintiff's right to recover that amount was not an exclusion of the plaintiff from such property, and that, consequently, art. 127 did not apply to the suit.

Ahmad Ali Khan *v.* Husain Ali Khan 109

———————, No. 141. *See* Limitation (3).

———————, Nos. 141, 144. (*Adverse possession against widow—Reversioner.*) *See* Hindu widow (1).

———————, Nos. 171B, 178. *Death of plaintiff-respondent—Application by defendants-appellants for substitution of legal representative—Civil Procedure Code, ss.* 3, 368, 582.] The judgment of the majority of the Full Bench in *Narain Das* v. *Lajja Ram* only decided that art. 171B, sch. ii, of the Limitation Act of 1877, did not apply to an application by a defendant-appellant to have the representative of a deceased plaintiff-respondent made a respondent. Art. 178 applies to such applications.

So *held* by the Full Bench, MAHMOOD, J., dissenting.

Held by MAHMOOD, J., that by reason of s. 3 (read with ss. 368 and 582) of the Civil Procedure Code, the word "defendant" in art. 171B of the Limitation Act necessarily includes a plaintiff-respondent. *Soshi Bhusan Chand* v. *Grish Chunder Talugdar* referred to.

Chajmal Das *v.* Jagdamba Prasad 260

———————. *Death of plaintiff-respondent—No application for substitution—Application by defendant-appellant for hearing of appeal.*] *Held* by the Full Bench that inasmuch as art. 178 and not art. 171B of the second schedule of the Limitation Act

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applied to the case of a deceased respondent whether plaintiff or defendant in the suit, an application by a defendant-appellant to have his appeal heard in the absence of any representative of the deceased plaintiff-respondent could not be allowed until the period prescribed by art. 178 had expired without the legal representatives of the deceased applying to be brought on the record in his place.

Ram Sarup v. Ram Sahai 270

ACTS—1877—XV, SCH. ii, Nos. 171B, 178. *Death of defendant-respondent—Application by plaintiff-appellant to have representative of deceased substituted as respondent—Civil Procedure Code, ss.* 3, 368, 582.] *Held* by the Full Bench (MAHMOOD, J., dissenting) that art. 171B of the second schedule of the Limitation Act does not apply to the death of a respondent, whether plaintiff or defendant in the original suit; and that art. 178 applies to an application made by a plaintiff-appellant to bring upon the record the representative of a deceased defendant-respondent.

Narain Das v. *Lajja Ram* and *Balkrishna Gopal* v. *Bal Joshi Sadashiv Joshi* referred to.

Baldeo v. *Bismillah Begam* and *Rameshar Singh* v. *Bisheshar Singh* overruled.

Held by MAHMOOD, J., *contra*, that the word "defendant" in art. 171B includes a defendant-respondent, and, reading art. 171B with clause 2 of s. 3 in conjunction with ss. 368 and 582 of the Civil Procedure Code, includes also a plaintiff-respondent; and that an application made by a plaintiff-appellant more than sixty days after the defendant-respondent's death to have the representative of the deceased made a respondent is barred by limitation, and the appeal is liable to abatement.

Soshi Bhusan Chand v. *Grish Chunder Taluqdar* referred to.

Debi Din v. Chunna Lal 264

————————, No. 178. *See* Limitation (2).

————————, No. 179 (4). *Application for execution withdrawn by decree-holder—Civil Procedure Code, ss.* 373, 374, 647.] S. 647 of the Civil Procedure Code makes s. 373 and 374 applicable to proceedings in execution of decree. *Kifayat Ali* v. *Ram Singh* and *Pirjada* v. *Pirjada* followed. *Tara Chand Megraj* v. *Kashinath Trimbak* and *Ramanandar Chetti* v. *Periatambi Shervai* dissented from.

A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings.

Held that, with reference to the second paragraph of s. 373 read with s. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application presented five years after the decree barred by limitation, with reference to art. 179 of the Limitation Act

Sarju Prasad v. Sita Ram 71

————1881—XII, s. 9. *See* Execution of decree (8) *and* Landholder and tenant (3).

————————, s. 36. *See* Landholder and tenant (2).

————————, ss. 39 (c) 40. *See* Landholder and tenant (2).

————————, ss. 84, 148. *See* Rent Act.

————————. ss. 124, 125, 128. (*Non-appearance of parties—Judgment by default.*) *See* Criminal Procedure Code, s. 195.

————————XXII, ss. 5, 12, 35, 42. (*License—Sub-lease—Breach of conditions of license—Consideration forbidden by law—Immoral consideration—Consideration opposed to public policy—Act IX of* 1872 *s.* 23.)] The plaintiff obtained from the excise authorities a license to

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manufacture and sell country liquor, such license containing a condition against sub-letting the benefits of the license. By s. 42 of the Excise Act (XXII of 1881) the violation of any condition of a license granted under the Act is made a punishable offence. The plaintiff sublet the license to defendants, who on the 5th of September, 1884, executed an agreement to pay to the plaintiff a certain sum of money, in which was included the sum of Rs. 1,500, which the defendants had undertaken to pay to plaintiff as rent reserved on the sub-lease. The plaintiff instituted the suit for recovery of the amount due to him on the agreement, and it was decreed by the Court of first instance but dismissed by the lower appellate Court.

On second appeal the plaintiff contended on the authority of *Gauri Shankar* v. *Mumtaz Ali Khan*, that his suit had been wrongly dismissed.

Held, that the sub-letting of license to manufacture and sell country liquor having been made punishable as an offence is to be deemed as an act contrary to law within the meaning of s. 23 of the Indian Contract Act (IX of 1872), and the claim to recover money due on such sub-lease was therefore not enforceable in a Court of justice.

Gauri Shankar v. *Mumtaz Ali* distinguished.

Debi Prasad v. Rup Ram 577

ACTS—1882—IV, ss. 3, 54. *See* Registration.

————, s. 68 *(b) (c)*. *Mortgage of non-transferable property—Right to sue for mortgage-money.*] Where a decree was obtained by a landholder for cancelment of a deed whereby an occupancy-holding was mortgaged with possession, and the mortgagee consequently failed to obtain possession, and brought a suit against the mortgagor to recover the mortgage-money—*held* that inasmuch as the mortgagor must have known that he was mortgaging an estate not legally transferable, while the mortgagee might have believed that the estate was transferable, the act of the former was a default depriving the latter of his security within the meaning of s. 68 *(b)* of the Transfer of Property Act (IV of 1882), and the mortgagee was, therefore, entitled to succeed.

Ganesh Singh v. Sujhari Kuar 47

————, s. 72 *(b)*.] S. 72 of the Transfer of Property Act only reproduces the rules of law which Courts of justice in India have uniformly adopted.

Girdhar Lal v. Bhola Nath 611

————, ss. 86, 87, 94. *Mortgage—Costs—Decree for foreclosure—Order absolute for foreclosure—Mortgagee obtaining possession—Subsequent application by mortgagee to execute order for costs—Civil Procedure Code, s.* 220.] A decree for foreclosure containing a distinct and separate order for costs was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs.

Held that the costs awarded could not be considered part of the money due upon the mortgage, and, as such, superseded by the order absolute and the mortgagee's possession thereunder, and the application must, therefore, be allowed. *Rutnessur Sein* v. *Jusoda* referred to.

Damodar Das v. Budh Kuar 179

————, ss. 88, 89, 90. *See* Mortgage (1).

————, s. 131. *Transfer of debt—Notice to debtor.*] *Held* that an assignment by endorsement of a registered bond hypothecating certain crops was a transaction relating to moveable property, and registration of such endorsement was not required by s. 17 of the Registration Act (III of 1877) or s. 54 of the Transfer of Property Act (IV of 1882); and that a suit by the assignee to enforce the

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hypothecation was not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, in which a second appeal would be barred by s. 586 of the Civil Procedure Code. *Surajpal Singh* v. *Jairamgir* followed. *Ram Gopal Shah* v. *Ram Gopal Shah* and *Appavu Pillai* v. *Subraya Muppan* referred to.

Held also that the assignment was not void by reason that notice thereof was not proved to have been given to the obligor, inasmuch as the effect of s. 131 of the Transfer of Property Act was merely to suspend the operation of the assignment up to the time when such notice was received; that in this case the assignment would come into operation against the obligor when he became aware of it by the institution of the suit; and that if he had prior notice, and sold the property to *bona fide* transferees for value without notice either of the charge created by the bond or of the assignment, such transferees would be protected from liability. *Lala Jugdeo Sahai* v. *Brij Behari Lal* referred to.

Kalka Prasad v. Chandan Singh 20

ACTS—1886—XVII, s. 8. *See* Civil Procedure Code, s, 13.

ADMINISTRATION-BOND. *Breach of condition—Compensation—Act X of 1865, ss. 256, 257— Act IX of 1872, s. 74, Exception.*] An administration-bond executed by an administrator in accordance with s. 256 of the Succession Act, is not an instrument of the kind referred to in the exception to s. 74 of the Contract Act, so as so make the obligor liable, upon breach of the condition thereof, to pay the whole amount mentioned therein; and an assignee of the bond under s. 257 of the Succession Act cannot recover more damage than he proves to have resulted to himself or to those interested in the bond,

Held therefore, where neither the assignee of such a bond nor any one else had suffered any damage by reason of the breach of a condition requiring the obligor to file an inventory of the estate within a specified period, that the assignee was not entitled to recover from the obligor any compensation in respect of such breach,

Lachman Das v. Chater 29

ARBITRATION. *Omission to fix time for delivery of award—Extension of time after expiration of period fixed—Effect of acceptance of award by the Court—Effect of arbitrator first tendering and then withdrawing resignation.*] The provision contained in s. 508 of the Civil Procedure Code, requiring the Court to fix a reasonable time for the delivery of the award is not imperative but directory, and non-compliance with it does not make the order of reference abortive and any subsequent arbitration proceedings ineffectual and bad.

Under s. 514 of the Code the Court may extend the time for making the award after the time fixed therefor has expired.

The last paragraph of s. 521 does not imply that an omission by the Court to fix a positive date within which the award is to be filed is fatal to the validity of the award.

Where an order extending the time for delivery of an award was made after the time fixed therefor had expired, and did not fix any positive date for the filing of the award,—*held* that the adoption of the award by the Court amounted to an enlargement of the time for delivery of the award to the date on which it was in fact delivered, and to a ratification of what had been done by the arbitrators, and that the parties, having made no objection to the action of the Court, must be taken to have waived any objection to the award.

The mere circumstance of an arbitrator having first tendered and then withdrawn his resignation does not formally divest him of his character as arbitrator. *Maharajah Joymungul Singh Bahadoor* v. *Mohun Ram Marwaree* referred to.

Har Narain Singh v. Bhagwant Kuar 137

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ARBITRATION. *See* Civil Procedure Code, ss. 521, 522.

ASSIGNMENT OF INTEREST PENDING SUIT—*Assignment after decree in Court of first instance—Assignee made party after appellate decree for purposes of execution. See* Civil Procedure Code, ss. 372, 647.

ATTACHMENT BEFORE JUDGMENT. (*Termination of attachment.*) *See* Execution of decree (2).

BOND—*Interest post diem—Non-payment of principal and interest at agreed date.*] Interest as interest cannot be allowed on money lent on a hypothecation bond, or on a deed of conditional sale, unless it appears from the bond or deed that it was intended by the parties that interest should be payable, and then only for the period during which it so appears that it was so intended. Where no such intention appears, interest can be given only by way of damages. *Cook* v. *Fowler* referred to.

Mansab Ali v. Gulab Chand 85

"CHAKDARS" *See* Pre-emption (5).

CIVIL PROCEDURE CODE, ss. 3, 368, 582. *See* Act XV of 1877, sch. ii, Nos. 171B, 178.

———————, s. 13. (*Act XVII of* 1886, *s.* 8—*Decree made in British India—Suit on judgment in a native territory—Cession of territory to British Government pending suit.*)] Prior to the cession of the town of Jhánsi to the British Government, plaintiff had instituted a suit in the Subah's Court in the Gwalior State on a judgment of the British Court in Jhánsi district. After the cession, the suit was made over for trial to the Court of the Assistant Commissioner of the Jhansi district. The suit was dismissed by the first Court as barred by s. 13 of the Code of Civil Procedure, but remanded by the lower appellate Court for trial on the merits.

Held, that the recital in part II of Act XXVII of 1886 shows that it was intended that suits pending in the Courts of the Gwalior State prior to the cession of the town of Jhánsi to the British Government should be continued in the courts of the Jhánsi district after the cession thereof; therefore the present suit, which if it had been originally instituted in a court of British India, could not have been maintained, being an action on a judgment of a court of British India, was a good and maintainable action in the Court where it was instituted, and was to be deemed to be a properly instituted suit to which in other respects the law of the Courts of British India might now be applied.

King v. *Hoare*, referred to as illustrating the distinction between an original cause of action founded upon a judgment recovered on the original cause of action.

Saloni v. Har Lal 517

———————, S. 13, EXPLANATION V. (*Joint Hindu family—Suit against two members—Second suit against third member.*)] The plaintiff sued the father and brother of defendant for trespass to a wall. His right to the wall was denied, but he obtained a decree. On executing the decree he was resisted by the defendant, who claimed the wall as his ancestral property and alleged that he was no party to the suit in which decree has been obtained against his father and brother. His claim was registered as a suit under s. 331 of the Code of Civil Procedure. Plaintiff contended that defendant was concluded by the decree obtained against his father and brother.

Held that a Hindu son in a joint family becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father; he does not claim under his father within the meaning of s. 13 of the Civil Procedure Code.

Held also that the defendants in the former suit did not claim any right in common for themselves and others within the meaning of Explanation V. of s. 13 of the Code of Civil Procedure.

The case of *Narayan Gop Hubbu* v. *Pandurang Ganu* distinguished.

Ram Narain v. Bishesher Prasad 411

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CIVIL PROCEDURE CODE s. 32. *See* ss. 365, 366, 367, 368, 582, 587.

——————, ss. 111, 216. *Suit for dissolution of partnership—Set-off.*] A suit for dissolution of partnership in which the claim was valued at Rs. 2,000, with a prayer that such balance as might be found due to the plaintiff upon taking the partnership accounts, might be paid to him is a suit for money within the meaning of s. 111 of the Code of Civil Procedure, and a plea of set-off may be raised in such a suit, and if in consequence of such plea the Court of first instance decrees in favour of the defendant a sum above Rs. 5,000, then by reason of the provision in paragraph ii, s. 216 of the Code, an appeal from that decree will lie to the High Court and not to the District Court.

Ramjiwan Mal *v.* Chand Mal 587

——————, s. 200. *Power of lower Court to amend decree affirmed on appeal.*] Where a decree for possession of immoveable property, passed by a lower appellate Court, omitted to specify the plots of land to which it related, and was upheld by the High Court by a decree which likewise gave no specification of those plots, and the lower appellate Court subsequently, on the decree-holder's application, amended its decree, under s. 206 of the Civil Procedure Code, by inserting the required specification—*held* that inasmuch as the effect of the amendment was not to alter the effect of the High Court's decree, or to affect property other than that actually claimed and decreed, the amendment was not contrary to law. *Shohrat Singh* v. *Bridgman*, *Gobardhan Das* v. *Gopal Ram*, *Kristo Kinkar Roy* v. *Rajah Burrodacant Roy* and *Sundara* v. *Subbana* referred to.

Ram Saran *v.* Persidhar Rai 51

——————, s. 214. (*Pre-emption—Conditional decree—Appeal—Purchase-money—Costs—Civil Procedure Code, s.* 583.)] A Court of first instance decreed a claim for pre-emption conditionally on the pre-emptor paying into Court Rs. 125 within a specified period, and also awarded the pre-emptor Rs. 39-9-0 as his costs in the suit. Within the specified period the pre-emptor paid into Court the Rs. 125, and subsequently executed his decree for costs, by drawing out therefrom the Rs. 39-9-0. After this the decree was modified on appeal, the appellate Court raising the Rs. 125 payable as the condition of pre-emption to Rs. 200, and reversing the first Court's order as to costs. Within the period specified in the appellate Court's decree the pre-emptor paid into Court the further sum of Rs. 75. Subsequently the vendee, defendant, applied to the Court under s. 583 of the Code of Civil Procedure to have the property in suit restored to him, contending that the pre-emptor had failed to pay the full Rs. 200 within the prescribed period.

Held by Straight, J., affirming the judgment of Mahmood, J., that this contention must fail; that the payment of Rs. 125 due under the first Court's decree could not be said to have been reduced by the pre-emptor subsequently executing against the amount so paid the order of that Court in his favour for costs, and that the subsequent payment of Rs. 75 within the period prescribed by the appellate Court satisfied the requirements of that Court's decree, subject to the judgment-debtor's right to recover the costs realized in execution of the first Court's decree.

Held by Tyrrell, J., *contra*, that although the pre-emptor had once made a payment, which for a few days was a compliance with the first Court's decree, such compliance became immaterial when that decree was modified on appeal, and as he had never had in any Court a credit for Rs. 200, as required by the appellate Court's decree, which alone was the decree in the cause, he had failed to fulfil the condition essential to pre-emption, and therefore the defendant's application should be allowed.

Balmukand *v.* Pancham 490

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CIVIL PROCEDURE CODE, ss. 214, 244. *Question for Court executing decree—Money paid into Court by pre-emptor—Suit for pre-emption dismissed on appeal—Suit for refund of money paid into Court.*] A suit for pre-emption was decreed conditionally on the plaintiff paying Rs. 1,595, which the Court determined was the amount of the sale consideration. He paid the amount to the vendees and the payment was certified under s. 258 of the Civil Procedure Code. Subsequently the decree was modified on appeal by increasing the amount of sale-consideration to Rs. 1,995, which the plaintiff was required to pay as the condition of pre-emption. He never paid the difference between the amount fixed by the first Court and the sum fixed as the true price by the appellate Court and the suit consequently stood dismissed. He then assigned to the plaintiff in the suit his right to recover the amount, Rs. 1,595, from the vendees, who after unsuccessful application made to the Court of first instance, under s. 244 of the Civil Procedure Code, to recover the amount, instituted this suit.

Held that the assignee was a representative of the plaintiff in the pre-emption suit within the meaning of s. 244 of the Civil Procedure Code, and the suit was therefore barred under the provisions of that section.

Ishur Das *v.* Koji Ram 354

———————, s. 220. *See* Act IV of 1882, ss. 86, 87, 94.

———————, s. 243. (*Stay of execution pending suit between decree-holder and judgment-debtor,—"Such Court."*)] *See* Execution of decree (12).

———————, ss. 244, 291. *Sale in execution of decree—Tender of debt by transferee of property—Question for Court executing decree—Separate suit.*] *Held* that the assignees of a purchaser from a judgment-debtor of property, the subject-matter of a decree for enforcement of hypothecation, were entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under s. 291 of the Civil Procedure Code, and that the executing Court was bound to accept the money and stop the sale.

Held also, where the executing Court had refused to accept the money and the sale had taken place, that a suit by the assignees to set aside the sale and for a declaration of their right to come in under s. 291 was not barred by s. 244 of the Code.

Behari Lal *v.* Gampat 1

———————, s. 244 (c). (*Joint decree—Purchase by judgment-debtor of rights of some of the decree-holders—Validity of sale and extent of rights purchased to be determined by Court executing the decree*). *See* Execution of decree (9).

———————ss. 246, 247—*Cross-decrees—Set-off.* *See* Execution of decree (8).

———————, s. 266 (*k*). ("*Expectancy*"—*Grant to Hindu widow for maintenance—Reversionary right of grantor.*) *See* Execution of decree (10).

———————, s. 295. *See* Execution of decree (5).

———————, s. 311. (*Sale in execution—Material irregularity in publishing or conducting sale—Sale without attachment*). *See* Execution of decree (2).

———————, 312. *See* Execution of decree (11).

———————s. 352. *Suit to establish right to sell property in execution of decree enforcing hypothecation—Suit against purchasers not parties to decree—Judgment-debtor declared insolvent pending suit—Decree-holder scheduling his decree under Civil Procedure Code, s. 352—Effect of schedule not to make suit unmaintainable.*] A suit to establish a right to bring to sale certain moveable property in execution of a decree for enforcement of hypothecation was brought against persons who were not parties to that decree and had purchased in execution

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of a prior decree. Pending the suit, one of the judgment-debtors under the hypothecation decree was declared an insolvent, and the plaintiff scheduled his decree as a claim under s. 352 of the Civil Procedure Code.

Held that the scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to and independent of it, and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree, unmaintainable.

Abdul Rahman *v.* Behari Puri 194

CIVIL PROCEDURE CODE, ss. 365, 366, 367, 368, 582, 587. *Death of plaintiff-respondent pending appeal—Substitution of alleged legal representative on her own application—Application by defendants-appellants to substitute another person as true legal representative—Power of Court to determine which of such persons is the true legal representative.*] In a suit for declaration of title to, and for possession of a share in alleged ancestral property with mesne profits, the plaintiff obtained a decree in the lower appellate Court from which the defendants appealed to the High Court. Pending the appeal, the plaintiff died childless, and, on her application, his widow was substituted for him as respondent. Subsequently the defendants-appellants applied to the High Court to have the deceased's father brought upon the record as respondent, alleging that he, and not the widow, was the deceased's legal representative and solely entitled to be placed on the record as such. The father made no objection to the proposed substitution. It was common ground that either the father alone or the widow alone was the deceased plaintiff-respondent's true legal representative.

Held by the Full Bench (MAHMOOD, J., dissenting) that, having regard to the words "as nearly as may be" and "as far as may be" in s. 582 of the Civil Procedure Code, ss. 365, 366, and 367 might be applied, at all events analogically, to the case so as to enable the real legal representative of the deceased plaintiff-respondent to be ascertained and brought upon the record; that the latter portion of s. 582 did not limit the earlier words of the section so as to make s. 368 the only provision applicable to the case; that a Court of record must have an inherent power to ascertain whether or not it has before it the proper parties to an appeal if the question be substantially raised; and that, therefore, the Court could and should, either before or at the hearing of the appeal, ascertain and determine for the purposes of the prosecution of the appeal the preliminary question whether the father or the widow was the legal representative of the deceased, and should act accordingly.

Held also by the Full Bench (MAHMOOD, J., dissenting) that s. 32 of the Code did not apply to the case, and that if it did apply, it would be the duty of the Court to decide whether the father or the widow was the legal representative of the deceased plaintiff-respondent.

Held by MAHMOOD, J., *contra*, that the effect of s. 582 read with s. 587 was to place the defendants-appellants in the position of plaintiffs and the deceased respondent in that of a defendant for the purposes of array of parties; that consequently the provisions of ss. 363, 364, 365, 366, and 367 had no application; that, applying s. 368, the Court was bound to implead the person named by the defendants-appellants as a respondent to the appeal; that, applying s. 32, the widow occupied a position which gave her a sufficient *prima facie* status to be impleaded as respondent; and that as there existed no authority in the Code allowing the Court to hold an enquiry whether the father or the widow was the true legal representative of the deceased plaintiff-respondent, the Court should bring both upon the record as respondents and proceed to decide the appeal after hearing both.

Narain Das v. *Laiju Ram*, *Har Narain Singh* v. *Kharag Singh*, *Lakshmibai* v. *Balkrishna*, *Rajmonee Dabee* v. *Chunder Kant Sandel*, *Narain Kuar* v. *Durjan Kuar*, and *Athiappa* v. *Ayasma*, referred to.

Muhammad Husain *v.* Khushalo 223

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CIVIL PROCEDURE CODE, ss. 372, 647. *Assignment after decree in Court of first instance—Assignee made party after appellate decree for purposes of execution.*] S. 372 of the Civil Procedure Code cannot be applied to the assignment, creation, or devolution of an interest subsequent to the decree in a suit. The section has no application to proceedings in execution of decree; and a Court has no jurisdiction, reading s. 372 with s. 647, to bring in a party after decree and make him a judgment-debtor for the purposes of execution. *Gocool Chunder Gossamee* v. *The Administrator-General of Bengal* and *Attorney General* v. *Corporation of Birmingham* referred to.

Where a Court had so acted, by an order which might have been, but was not, made the subject of appeal under s. 588 of the Code,—*held* that as there was no jurisdiction to make such an order, the party aggrieved was competent to object thereto on appeal from a subsequent order enforcing execution against him as a judgment-debtor.

Goodall v. The Mussoorie Bank, Limited 97

———————, ss. 373, 374, 647. *Application for execution withdrawn by decree-holder—Act XV of 1877. sch ii., No. 179 (4).*] S. 647 of the Civil Procedure Code makes ss. 373 and 374 applicable to proceedings in execution of decree. *Kifayat Ali* v. *Ram Singh* and *Pirjade* v. *Pirjade* followed. *Tara Chand Megraj* v. *Kashinath Trimbak* and *Ramanandan Chetti* v. *Periatambi Sherwai* dissented from.

A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings.

Held that, with reference to the second paragraph of s. 373 read with s. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application presented five years after the decree barred by limitation, with reference to art. 179 of the Limitation Act.

Surju Prasad v. Sita Ram 71

———————, s. 401, EXPLANATION. (*Suit in forma pauperis—"Pauper"—Inquiry into pauperism.*) *See* Civil Procedure Code, s. 622.

———————, s. 486. (*Attachment before judgment—Termination of attachment.*) *See* Execution of decree (2).

———————, s. 492. *"Wrongfully" sold in execution of decree—Temporary injunction.*] An objection made under s. 278 of the Civil Procedure Code to the attachment in execution of a decree of a mortgage bond of which the objector claimed to be the assignee from the judgment-debtors under an instrument dated prior to the attachment was disallowed; and the objector then brought two suits against the decree-holder and the judgment-debtors, in which he claimed (*a*) a declaration of his right to the bond, and (*b*) to recover a sum of money from the judgment-debtors on the basis of the assignment. The first Court dismissed both suits, on the ground that the alleged assignment was a collusive transaction entered into after the attachment between the objector and the judgment-debtors for the purpose of defeating the attachment. Pending an appeal to the High Court, the objector applied to that Court for a temporary injunction under s. 492 of the Code, restraining the decree-holder from bringing the bond to sale in execution of the decree.

Held that, although in such cases the provisions of s. 492 should be applied with the greatest care, one of the objects of the Legislature in passing that section was to guard as far as possible against multiplicity of suits, and as many complications probably resulting in further litigation were likely to arise if the decree-holder were allowed

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to proceed with the execution-sale, and no practical injury to anyone would be caused by restraining her from so doing until the decision of the appeal, a temporary injunction should be granted, subject to security being given by the appellant.

Kirpa Dayal *v.* Rani Kishori 80

CIVIL PROCEDURE CODE, *s.* 508. *See* Arbitration (1).

———, *s.* 514. *See* Arbitration (1).

———, *s.* 521. *See* Arbitration (1).

———, ss. 521, 522. *Arbitration—Revocation of submission—Appellate decree in accordance with award—Civil Procedure Code, ss.* 522.] By reason of s. 522 of the Civil Procedure Code, where a Court of first instance wrongly sets aside an arbitration award and passes a decree against the terms thereof, and a Court of first appeal, holding that the award was not open to objection upon the grounds mentioned in *s.* 521, passes a decree strictly in accordance with the award, such appellate decree is entitled to the same finality as the first Court's decree would have been under the last paragraph of s. 522, and cannot be made the subject of second appeal. *Pureshnath Dey v. Nobin Chunder Dutt and Rughoober Dyal v. Maina Koer* dissented from.

Naurang Singh *v.* Sadapal Singh 3

———, s. 561. *Dismissal of appeal as barred by limitation—Objections not entertainable.*] The entertainment of objections under s. 561 of the Civil Procedure Code is contingent and dependent upon the hearing of the appeal in which such objections are taken, and when that appeal itself fails, is rejected, or dismissed without being disposed of upon the merits, the objections cannot be entertained either.

Ramjiwan Mal *v.* Chand Mal 587

———, ss. 562, 563, 564, 566. *Practice—Remand.*] In a suit for possession of property by right of inheritance, the Court framed six issues, four of which it tried and decided. With reference to its finding upon the principal of these issues, which related to the plaintiff's legitimacy, the Court dismissed the suit, observing that, in the view which it took of the case, the determination of the remaining issues was unnecessary. Some of the defendants had filed a statement of defence upon which no issues were framed, and no evidence taken, apparently in consequence of the attention of the Court being directed almost exclusively to the main issue as to the plaintiff's legitimacy. There was no formal order excluding evidence on any point. On appeal, the High Court reversed the first Court's finding on the issue with reference to which the suit had been dismissed below.

Held by EDGE, C. J., and MAHMOOD, J., (STRAIGHT, J., dissenting) that s. 562 of the Civil Procedure Code applied not only to cases where the first Court had expressly excluded evidence, but also to cases where the parties were or might have been misled by the act of the Court as to the issues or the evidence necessary, and where, in consequence of the Court erroneously considering one issue only, the parties did not tender or bring forward their evidence; and that, as in the present case evidence had been excluded in this broad sense, s. 562 (the operation of which in such cases should be rather expanded than limited) was applicable, and the case should be remanded for trial of the remaining issues.

Held by STRAIGHT, J., *contra*, that, with reference to ss. 562, 563, and 564, the case could not be remanded under s. 562 because it had not been disposed of upon a preliminary point so as to exclude evidence of fact, and the Court should therefore proceed to dispose of it upon the evidence on the record, if any; and that an issue should be remitted to the lower Court under s. 566.

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CIVIL PROCEDURE CODE, ss. 566, 567. *See* Practice (3).

———————, s. 582. *See* ss. 521, 522.

———————, s. 622. (*High Court's powers of revision—Practice—Civil Procedure Code, s.* 401, *Explanation.*)] On an application to sue *in formâ pauperis* the Court is required to deal with the question of the applicant's pauperism with reference to the definition of that word as given in the Explanation to s. 401 of the Code of Civil Procedure, and in deciding it to ascertain the exact property, its market value and the title thereto and then to deal with the case under s. 407 of the Code, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure.

All orders passed under s. 407 of the Code of Civil Procedure are not excluded from the exercise of revisional powers of the High Court under s. 622 of the Code, *Chatterpal Singh* v. *Raja Ram* notwithstanding.

In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order.

Mulummad Husain *v.* Ajudhia Prasad 467

———————. *Jurisdiction, presumption of—Maxim, omnia præsumuntur rite et solemniter esse acta—Civil Procedure Code, ss.* 103, 283, 647.] The consideration of an objection under s. 278 of the Civil Procedure Code, having first been entertained and adjourned by an Additional Subordinate Judge, subsequently came before the Subordinate Judge, who struck off the case for default. No order under s. 25 transferring the case to the Subordinate Judge was on the record, nor was it otherwise shown how he obtained jurisdiction to deal with it.

Held that the High Court, in the exercise of its revisional powers under s. 622 of the Code, should not presume that the Subordinate Judge had taken up the case without jurisdiction, that the proper remedy of the petitioner was an application under s. 103, read with s. 647, or a suit under s. 283, and that the High Court should not interfere in revision.

Sheo Prasad Singh *v.* Kasturn Kuar 119

CIVIL AND REVENUE COURTS—*Jurisdiction.* *See* Partition.

"COMPLAINT". *See* Criminal Procedure Code, s. 198.

COSTS. (*Pre-emption—Conditional decree—Purchase-money—Appeal.*)] *See* Civil Procedure Code, s. 214.

———. *See* Act IV of 1882, ss. 86, 87, 94.

CRIMINAL PROCEDURE CODE, s. 4. *See* s. 198.

———————, ss. 35, 235. *Act XLV of* 1860, *ss.* 380, 454—*House-breaking in order to the commission of theft—Theft—Separate convictions and sentences.*] Under ss. 35 and 235 of the Criminal Procedure Code a Magistrate may legally pass a separate sentence of two years' rigorous imprisonment and fine under each of the sections 379 or 380 and 454 of the Penal Code, for house-breaking in order to the commission of theft and theft, the two offences forming part of the same transaction and being tried together. In such a case, where the prisoner had been three times previously convicted,—*held* that the better course would have been to commit him to the Court of Session under ss. 454-75 of the Code.

But a Sessions Judge trying such a case under s. 379 or s. 380 and s. 454 would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 and of four years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-

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breakers who had not only intended to commit but had actually committed theft.

Queen-Empress v. *Ajudhia* and *Queen-Empress* v. *Sukharam Bhan* referred to.

Queen-Empress *v.* Zor Singh 146

CRIMINAL PROCEDURE CODE, ss. 35, 235. *See* Several offences.

———————————, s. 144. *See* Act X of 1872, s. 518.

———————————, s. 195. [*Sanction for prosecution for giving false evidence in a suit under Act XII of* 1881 *tried by an Assistant Collector of the second class—Sanction granted by Collector—Jurisdiction of Sessions Judge to entertain application to revoke sanction.*] A suit for arrears of rent under s. 93, clause (*a*), Act XII of 1881, was heard by a Tahsíldár having the powers of and acting as an Assistant Collector. Application was made to him for an order sanctioning the prosecution of a witness for having given false evidence in the course of the trial of the suit. The Tahsíldár referred the matter to the Magistrate of the district, who was the Collector, and that officer made an order sanctioning the prosecution. From this order the witness applied to the Court of the District Judge to revoke the sanction. That Court, being of opinion that the Court of the Collector was not subordinate to it in the matter within the meaning of s. 195 of the Code of Criminal Procedure, 1882, declined to interfere. The witness then applied to the Commissioner of the Division, and that officer, holding that he had no jurisdiction in the matter, also declined to interfere. On application by the witness to the High Court for revision of the order of the Court of the District Judge:

Held, that the Court of a Collector, when granting sanction for prosecution under s. 195 of the Code of Criminal Procedure, 1882, in respect of false evidence given in the course of the trial of a rent case from the final decision in which there was no appeal to the Court of the Judge of the District, was still to be deemed subordinate to it, within the meaning of that section, and the Court of the District Judge may be taken to be the Court to which appeals from the decisions of the Collector ordinarily lie.

Hari Prasad *v.* Debi Dial 582

———————————s. 195. *See* Limitation (1).

———————————, s. 198. "*Complaint*"—*Criminal Procedure Code, ss. 4, 200—Charge of defamation not made in complaint, but added in subsequent examination.*] A charge of defamation not contained in the complaint presented to the Magistrate, but added subsequently by the Magistrate upon statements made by the complainant in his examination under s. 200 of the Criminal Procedure Code, whether of his own accord or in consequence of suggestions from the Magistrate, is not a legal "complaint" made by an aggrieved person within the meaning of ss. 4 (*a*) and 198, so as to enable the Magistrate to take cognizance of the offence. *Queen-Empress* v. *Kallu* referred to.

Queen-Empress *v.* Deokinandan 39

———————————, s. 200. *See* s. 198.

———————————, s. 260.—*Complaint including charge not summarily triable.—Summary jurisdiction not necessarily ousted thereby.*] The mere circumstance of a complaint charging an accused person with offences not summarily triable along with other offences so triable, would not necessarily oust the summary jurisdiction of a Magistrate under s. 260 of the Criminal Procedure Code. Whether a complaint affords sufficient grounds for a summary trial, or requires a trial according to the ordinary procedure, must be left in a great measure to the discretion of the Magistrate, exercised with due care according to judicial methods with reference to the circumstances of each case. *Ramchunder Chatterjee* v. *Kunhya Laha, Chunder Seekur*

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Sookul v. *Dhurm Nath Tewaree*, *Bepotoolah* v. *Najim Sheikh*, and *Empress* v. *Abdul Karim* referred to.

Queen-Empress v. Jagjiwan 55

CRIMINAL PROCEDURE CODE, s. 289. [" *No evidence*"—*Acquittal of accused without taking opinions of assessors.*)] The words "there is no evidence" in s. 289 of Code of Criminal Procedure, 1882, cannot be extended to mean *no satisfactory, trustworthy, or conclusive evidence*; but the third paragraph of the section means that if at a certain stage of a Sessions trial the Court is satisfied that there is not on the record any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged, then the Court has power, without consulting the assessors, to record a finding of not guilty.

But where a Court so acts only because it considers the evidence for the prosecution unsatisfactory, untrustworthy, or inconclusive, it acts without jurisdiction, and its order discharging the accused is illegal. Even if not illegal for want of jurisdiction, such action is a serious irregularity, which may or perhaps must have caused a failure of justice within the meaning of s. 537 of the Code of Criminal Procedure.

In the matter of the petition of Narain Das referred to.

Queen-Empress v. Munna Lal 414

——————— ss. 380, 454—*Separate convictions and sentence* *See* Criminal Procedure Code, ss. 35, 235.

———————, s. 509. *Deposition of medical witness taken by Magistrate tendered at sessions trial—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence—Act I of* 1872 *s.* 80.] Although all depositions of witnesses in criminal cases should be taken and attested in the presence of the accused, and a few apt words should be used on the face of the deposition to make it apparent that this has been done, there is no provision of the law which makes the attestation of the deposition by the Court in the presence of the accused obligatory.

S. 80 of the Evidence Act therefore does not warrant the presumption that the deposition of a medical witness taken by a committing Magistrate has been taken and attested in the accused's presence, so as to make such deposition admissible in evidence at the trial before the Court of Session under s. 509 of the Criminal Procedure Code. *Queen-Empress* v. *Biding* referred to.

Queen-Empress v. Pohp Singh 174

———————, s. 557. (*Acquittal of accused without taking opinion of assessor.*)] *See* Criminal Procedure Code, s. 289.

CROSS-DECREES. *See* Execution of decree (3).

CUSTOM. (*Pre-emption—Evidence—Decrees enforcing right.*) *See* Pre-emption (8).

———. *Privacy, right of.* *See* Easement.

———. *See* Hindu Law (1).

DEBT, TRANSFER OF. *See* Act IV of 1882, s. 131.

DECREE. *Rent suit—Intervenor—Not conclusive in a civil suit for declaration of right to and possession of land.* *See* Rent Act.

DEFAMATION. (*Cause of action—Verbal abuse—Special damage—Witness—Privilege.*)] The plaintiff was cited as a witness by one *S.* in a suit instituted by him against defendant. After plaintiff's evidence had been concluded, in which he stated that there was no enmity between him and defendant, the defendant was examined by the Court, and stated that there was enmity between him and plaintiff, and on the Court inquiring what was the cause of enmity, defendant used words conveying the meaning that plaintiff's descent was illegitimate.

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Held by Brodhurst, J., that, under the circumstances, the statement complained of was made by defendant while deposing in the witness-box, and therefore absolutely privileged.

Per Mahmood, J. (*contra*), that the question whether or not the statement complained of was made by defendant in course of his deposition, or after it was finished and when he was no longer in the witness-box, had not been tried, and the order remanding the case for trial in the merits was right.

Further, that the English law of slander as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage, is not applicable to this country, either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India.

That whilst the English law of defamation recognises no distinction between defamation as such and personal insult in civil liability, the law of British India recognises personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage.

That such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury, apart from defamation, and that malice is an element of liability for abusive and insulting language, and that such malice will be presumed or inferred, unless the contrary is shown.

That when the defendant is not absolutely privileged and protected by reason of the office or occasion in which he employed such language, he renders himself subject to a civil liability for damage, irrespective of any plea of justification based upon proving the truth of the statements contained in the abusive and insulting language complained of.

That the rule of English law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon public policy, which is equally applicable to insulting and abusive language used by such witness; and such statements when made in the witness-box are privileged and protected, even though made maliciously and falsely, so long as they are relevant to the inquiry in the broadest sense of the phrase.

That even where such statements have no reference to the inquiry, the defendant may prove the absence of malice and that they were made in good faith for the public good.

The following cases were referred to in the judgments—*Scott* v. *Stansfield*, *Munster* v. *Lamb*, *Mackay* v. *Ford*, *Seaman* v. *Netherclift*, *Dawkins* v. *Rokeby*, *Henderson* v. *Broomhead*, *Srikant Ray* v. *Satcori Shaha*, *Ibn Husain* v. *Haidar*, *Parbati* v. *Mannar*, *Roberts* v. *Roberts*, *Lynch* v. *Knight*, *Abdul Hakim* v. *Tej Chunder Mukarji*, *Sri Raja Sitarama Krishna Rayadappa Ranga Rax Bahadur Garu* v. *Sri Raja Sanyasi Razu Pedda Baliyara Simhhula Bahadur Garu*, *Godai* v. *Bhowanee Pershad*, *Subbaiyar* v. *Kristnaiyar*, *Pitamber Dass* v. *Dwarka Pershad*, *Queen-Empress* v. *Dhun Singh*.

Dawan Singh *v.* Mahip Singh 426

DISSOLUTION OF MARRIAGE. *Suit for—Decree made by District Judge—Confirmation by the High Court—Application by petitioner and respondent that decree should not be made absolute—Act IV of* 1869, *ss.* 10, 17.)] In a suit for divorce by the husband as petitioner against his wife and another person as co-respondent, the Court of the Judicial Commissioner of Oudh, where the suit was instituted, passed a decree *nisi*, and the record of the case was forwarded to the High Court for confirmation under s. 17 of the Indian Divorce Act. The petitioner and the respondent, his wife, also forwarded to the High Court through the Registrar of the Court of the Judicial Commissioner a petition in which they expressed their intention of living together as

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man and wife, and asked the Court not to make the decree absolute. On the 2nd June the case came before the Court, when an order was passed that it should stand over for a fortnight to enable the petitioners to appear in person or by pleader. At the adjourned hearing both the petitioner and the respondent were represented by one vakil, and he prayed the Court not to make the decree *nisi* absolute.

Held, by Edge, C. J., and Brodhurst, J., that the Court should accede to the prayer of the petition and not make absolute the decree passed by the Judicial Commissioner of Oudh.

Further, that a suit for a divorce is to be dealt with like all other cases between private litigants, and therefore the High Court should not make a decree *nisi* absolute without a motion being made to it to that effect.

Held, by Mahmood, J., that proceedings in a Divorce Court are quasi-criminal, and that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties.

Held, further, that as in the Indian Divorce Act no express power is given to the parties to the suit to prevent a decree *nisi* passed in it by the District Judge from being made absolute, the principles of the practice of the English Divorce Act in such a matter might well be followed, and an order be made at the desire of both parties staying the proceedings in the cause and not setting aside the decree *nisi*, which cannot be done. *Lewis* v. *Lewis* referred to.

Culley *v.* Culley 550

DISTRAINER. *Suit to contest demand of. See* Rent Act.

EASEMENT. *Privacy, right of—Custom.*] A customary right of privacy, under certain conditions, exists in India and in the North-Western Provinces, and is not unreasonable, but is merely an application of the maxims *sic utere tuo ut alienum non laedas* and *aedificare in tuo proprio solo non licet quod alteri noceat.*

A substantial interference with such a right, where it exists, if without the consent or acquiescence of the owner of the dominant tenement, affords such owner a good cause of action.

Each case in which such a right is in dispute, must be decided upon its own facts, the primary question in all cases being, whether the privacy in fact, and substantially exists, and has been in fact enjoyed. If this is answered in the negative, no further question arises. If in the affirmative, the next question is, whether, the privacy has been substantially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking relief against such acts.

In the case of a building for *parda* purposes, newly erected without the acquiescence of the owner of an adjacent building site, a custom preventing such owner from so building as to interfere with the privacy of the first new building would be unreasonable and consequently bad in law. But if such adjacent owner, without protest or notice, allowed his neighbour to erect and consequently to incur expenses in connection with a building for the use of *parda-nashin* women, a custom preventing him from interfering with the privacy of such new building would not, in India, be unreasonable.

Gokal Prasad *v.* Radho 358

————, CUSTOMARY. *Privacy.*] Case in which it was found that the plaintiff was by local custom entitled to an easement of privacy, and in which the Court granted a mandatory order compelling the defendant to permanently close the door or window complained of.

Luchman Prasad *v.* Jumna Prasad 162

EVIDENCE. (*Decree enforcing right—Custom—Pre-emption.*) *See* Pre-emption (3).

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EVIDENCE.—(*Exclusion of evidence of oral agreement—Act I of* 1872, *s.* 92—"*Between the parties.*")] The words in s. 92 of the Evidence Act (I of 1872) "between the parties to any such instrument" refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favour a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related.

M conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser and that defendant was only nominally associated with him in the deed. *Held* that s. 92 of the Evidence Act would not preclude plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers.

Mulchand *v.* Madho Ram 421

——— *Witnesses—Competency of persons of tender years—Act I of* 1872, *s.* 118—*Judicial oath or affirmation. See* Act X of 1873, *ss.* 6, 13.

EXCISE. (*Licenses—Sub-lease—Breach of—Conditions of licenses—Act XII of* 1881 *ss.* 5, 12, 35, 42—*Act IX of* 1872, *s.* 23). *See* Act XXII of 1881, ss. 5, 12, 35, 42.

EXECUTION OF DECREE—*Application for execution withdrawn by decree-holder. See* Act XV of 1877, sch. ii, No. 179 (4), *and* Civil Procedure Code, ss, 373, 374, 647.

(2) ——— . (*Attachment before judgment—Termination of attachment—Sale in execution—Material irregularity in publishing or conducting sale without attachment—Waiver—Civil Procedure Code, ss.* 311, 493.)] The plaintiff instituted a suit against defendant for recovery of money, and previous to judgment, that is, on the 8th of January, 1885 applied for, and on the 11th obtained, order for attachment of several houses and premises belonging to defendant, and such attachment was made. The suit was dismissed, but eventually on appeal it was decreed; but the attachment was never withdrawn. Plaintiff then applied for execution of his decree, and his application was granted by an order directing that the property of the judgment-debtor should be notified for sale on the 1st February, 1887, and accordingly on the 21st December, 1886, a sale notification was issued. Judgment-debtor twice applied for postponement of sale, but his applications were refused and the sale took place on the date fixed. Judgment-debtor then objected to the confirmation of the sale, urging that the property sold was never attached in execution of the decree, and the attachment previous to judgment was infructuous because afterwards the claim was dismissed by the Court of first instance; that there had been several other irregularities in publishing and conducting the sale; and that owing to the irregularities, the property had been sold at a grossly inadequate price, causing substantial injury. The Subordinate Judge overruling the objections confirmed the sale. On appeal by the judgment-debtor, *held* following *Mahadeo Dubey* v. *Bhola Nath Dichit*, that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money; and where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void, and may be set aside without any inquiry as to substantial injury being sustained by the judgment-debtor for want of a valid attachment, and that an attachment before judgment, like a temporary injunction, becomes *functus officio* as soon as the suit terminates. Further, that the phrase "a material irregularity in publishing or conducting" in the first paragraph of s. 311 of the Code of

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Civil Procedure should be liberally construed, and that absence of attachment of property at the time of sale thereof is "a material irregularity," attachment being the first step which a Court in executing a simple money decree has to take to assert its authority to bring property to compulsory sale.

The following cases were referred to.

Mahadeo Dubey v. *Bhola Nath Dichit*, *Chunni Kuar* v. *Dwarka Prasad*, *Mohee-oodeen* v. *Ahmed Hossain*, *Gangathara Pandita* v. *Rathaboi Ammal*, *Imamunissa Bibi* v. *Leakat Hossain*, *Rameshwari Dassee* v. *Doorgadas Chatterjee*, *Bakhshi Nandkishore* v. *Malikchund*, *Jasoda* v. *Mathura Das*, *Girdhari Sing* v. *Hardeo Narain Sing*, *Macnaghten* v. *Mahabir Parshad Sing*.

Ram Chand *v.* Pitam Mal 506

(3) EXECUTION OF DECREE. *Civil Procedure Code, ss.* 246, 247—*Cross-decrees—Set-off—Limitation.*] Under two decrees of the Sadr Diwani Adalat passed in 1864, *A* was entitled to two-thirds and *B* to one-third of certain immoveable property, with mesne profits in proportion. Each obtained possession of the immoveable property decreed to him. *B* appealed to the Privy Council from both decrees in respect of the two-thirds awarded to *A*. In April, 1866, pending the appeal, *A* applied for an account of the mesne profits due to him after setting off the mesne profits due to *B*, but as he failed to comply with a condition requiring him to give security for the amount claimed, in case the Privy Council should allow *B's* appeal, the application was struck off. In January, 1867, *B* applied for the mesne profits of the one-third decreed to him, and the Court found Rs. 18,000 to be the amount so due, but, on application by *A*, stayed further execution pending the Privy Council's decision. In 1873 the Privy Council dismissed *B's* appeal. In 1885, *A*, in execution of the Privy Council's decree, applied for Rs. 50,000 as mesne profits in respect of the two-thirds. *B* at the same time applied that the Rs. 18,000 declared in 1867 to be due to him in respect of the one-third might be set-off against the amount claimed by A.

Held that the question of the amount due to *A* up to the date when he acquired possession of the two-thirds and which had never yet been decided should be re-opened from the point at which it was left in 1866; that if this amount exceeded the Rs. 18,000 declared in 1867 to be due to *B*, satisfaction of *A's* claim to that extent should be entered up and the balance recovered from *B*; and that this course, if not strictly in accordance with the letter, was in accordance with the spirit of ss. 246, 247 of the Civil Procedure Code, and at all events should be allowed on principles of natural equity.

Held also that until the amount due to *A* had been definitely ascertained in the execution department, *B's* right to maintain his set-off did not arise; that the set-off was, therefore, not barred by limitation; that the order of January, 1867 was equivalent to a decree for the amount declared thereby as due to *B*; that when the execution department had determined the amount due to *A*, that decision also would be a decree, and that s. 246 of the Code could then be applied.

Matadin *v.* Chandi Din 188

(4) ——————. *See* Sale in execution of decree.

(5) ——————. *Civil Procedure Code, s.* 295—"*Decrees for money*"—"*Same judgment-debtor*"—*Decree for enforcement of lien and against judgment-debtor personally—Decree-holder entitled to proceed against property or person as he may think fit.*] *U* held a money-decree against *B.*, *P.*, and *R*, in execution whereof he caused to be attached and sold certain property belonging to *B.* *D* held a decree against *H*, *P*, *B*, and *S*, which, so far as *P*, *R*, and *S* were concerned, was a decree for enforcement of hypothecation by sale of the judgment-debtor's property, but which did not direct the sale of specific property belonging to *B*. An application by *D*, under s. 295 of the Civil Procedure Code,

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for an order enabling him to share ratably in the proceeds of *U's* execution was rejected.

Held that there being no question of fraud in the case, *D* was entitled to enforce his decree in the first instance against the property of *B*; that his decree against *B* did not lose the character of a decree for money under s. 295 of the Code, because it directed a sale of the property of the other judgment-debtor; and that the fact that there were four judgment-debtors in *D's* decree and only three in *U's* would not deprive *D* of the right to share ratably. *Shumbhoo Nath Poddar* v. *Lucky Nath Dey* referred to. *Deboki Nundan Sen* v. *Hart*, *Jagat Narain Pal* v. *Dhundhey Rai* and *Hart* v. *Tara Prasanna Mukerji* distinguished.

The Delhi and London Bank v. The Uncovenanted Service Bank, Bareilly 35

(G) EXECUTION OF DECREE—(*Deceased judgment-debtor—Execution against a person not the legal representative.*)] The defendants along with one *N*. and *C*, had brought a suit against one *A*. in the Civil Court at Peshawar in the Panjab and obtained a decree on the 23rd July, 1878, for Rs. 30,545-12-0. In 1881 application for transfer of the decree to the Court at Moradabad for execution was made and it was granted but no steps were taken thereupon. On the 12th June, 1883, *A* died. On the 30th April, 1884, the defendants again applied to the Court at Peshawar treating their judgment-debtor as being then alive, for fresh certificate to execute their decree in the Moradabad district, and obtained it. On the 20th of August, 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it, it was stated that the application was "for execution against Ajudhia Prasad and after his death against Angan Lal, the own brother, and Durga Kuar, widow, and Lachman Prasad and others, sons of Ajudhya Prasad, residents of Kundarki and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, Judgment-debtors." It was further stated that "the judgment-debtor was dead and his heirs are living and in possession of his estate, and Angan Lal himself has realised Rs. 9,037-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and appropriated the same, therefore to that extent the person of the said Angan Lal was liable." Notification of this application was issued to Angan Lal as also to the other persons named therein. Angan Lal objected to the application as against him, stating that, although he was the brother of *A*, deceased, yet he always lived separate and carried on business separately; and that there was no connection or partnership between him and the deceased judgment-debtor and that he had no property of the deceased in his possession. Further that as *A*. left issue it was wrong to call him as heir to *A*, and take out execution process against him. In reply to these objections the judgment-creditors (defendants) did not contend that Angan Lal was the legal representative of the deceased judgment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased and therefore liable to the extent of the sum so received by him. The Subordinate Judge holding that Angan Lal was the brother of the deceased and had realised the amount from the Commissariat office, which he failed to prove that he paid to the deceased, ordered execution to proceed against him. Angan Lal then instituted this suit to set aside the order of the Subordinate Judge. It was contended first, that the suit was in effect a suit under s. 283 of the Code of Civil Procedure and therefore barred as not having been brought within a year from the order of the Subordinate Judge; and secondly, that the proceedings of the Subordinate Judge were held under s. 244 of the Code and therefore no separate suit would lie.

Held, that the first contention must fail, inasmuch as an essential condition precedent to a suit under s. 283 of the Code, is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made into such objection; and lastly,

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of its being allowed or disallowed, and these conditions did not exist in this case. The second contention also must fail, as the Subordinate Judge never treated the proceedings in execution against Angan Lal upon the footing that he was the legal representative of the deceased judgment-debtor.

Mirza Mahomed Aga Ali Khan Bahadur, v. *Balmukund*, *Sayid Nadir Hossain* v. *Bipen Chund Bassarat* were referred to.

Angan Lal *v.* Gudar Mal 479

(7) EXECUTION OF DECREE—*Decree for enforcement of hypothecation—Decree limiting judgment debtor's liability to the hypothecated property.*] A decree upon a hypothecation bond which only provides for its enforcement against the hypothecated property cannot be executed against the person or other property of the judgment-debtor, though an order for costs contained therein may be so executed.

Pran Kuar *v.* Durga Prasad 127

(8) ——————————. *Decree for enforcement of hypothecation—Objection by judgment-debtor that property ordered to be sold is not transferable under N.-W. P. Rent Act, s. 9—Such objection not entertainable in execution.*] In execution of a decree for enforcement of hypothecation by sale of specific property, an objection by the judgment-debtor that the property is not transferable, with reference to s. 9 of the N.-W. P. Rent Act, cannot be entertained.

Madho Lal *v.* Katwari 130

(9) ——————————. (*Joint decree—Decree for possession of immoveable property—Purchase by judgment-debtor of rights of some of the joint decree-holders—Decree extinguished pro tanto—Validity of sale and extent of rights purchased to be determined by Court executing the decree—Civil Procedure Code s. 244 (c).*)] Where, subsequent to a decree, a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property.

The rule of law against breaking up the integrity of a mortgage security is a rule aiming at the protection of the mortgagee and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property.

Disputes as to the legality of the purchase by judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates and the extent of the share acquired under the purchase, are questions falling within the purview of clause (*c*) of s. 244 of the Code of Civil Procedure and must be determined by order of the Court executing the decree.

Banarsi Das v. *Maharani Kuar*, *Wise* v. *Abdool Ali*, and *Pogose* v. *Fukuroddeen Mahomed Ahsan*, referred to.

Kundhai *v.* Shoo Dayal 570

(10) ——————————. (*Property liable to attachment and sale—Grant to Hindu widow for maintenance for life—Reversionary right of grantor—Act VIII of 1859, s. 205—Civil Procedure Code, s. 266 (k.)*] One *N*, the sole owner of a certain village, had a son *J. J.* had two wives. By his first wife he had a son *U. J.*'s second wife was *G.* by whom he had a son whose widow was *K.*, the defendant in the suit. *J.* died, leaving *U.* his son, *G.* his widow, and *K.* his son's widow, and on his death *U.* inherited the village. Prior to the year 1874 *U.* had made a gift to *G.* of 105 bighas situate in the village. In 1874 the rights and interests of *U.* in the village were sold by auction and purchased by *T.*, the ancestor of the plaintiffs. *G.* by a deed of gift conveyed the 105 bighas to *K.* and ultimately died on 26th January, 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned

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Judge found that the land was given to *G.* in lieu of her maintenance which she was to hold rent free for her life and that she had been in possession thereof for twenty years. Further that *U.* had the right to resume the land and assess it to rent on the death of *G.* and all the rights that interests of *U.* in the land were attached and sold in 1874. On second appeal it was contended that the interest of *U.* in the land at the time of the sale of the village by auction was in the nature of a mere expectancy and therefore could not be sold and was not sold. *Held*, that *U.* gave to *G.* the usufruct of the land for her life in lieu of her maintenance. That after the gift the interest of *U.* in the land was of the same character and carried with it the same consequences as the reversion which the lessor would have for land leased for life or years and analogous to the right which a mortgagor who had granted a usufructuary mortgage would have. That *U.* had a vested right in the land which was capable of being sold and that right passed to the auction purchaser at the sale of 1874.

Counsel for appellant cited the following cases in the course of his argument: *Koraj Koonwar* v. *Komul Koonwar*, *Ram Chunder Tanta Doss* v. *Dhurmo Narain Chukarbatty*, *Tuffuzzool Husain Khan* v. *Raghunath Pershad*.

Kachwain *v.* Sarup Chaud 402

(11) EXECUTION OF DECREE.—*Sale in execution pending appeal from decree—Application for confirmation of sale after reversal of decree—Court not competent to grant confirmation—Civil Procedure Code, s.* 311.] Where a sale in execution of a decree has taken place pending an appeal, and the decree has subsequently been reversed, the Court executing the decree cannot, after such reversal, grant confirmation of the sale. *Basappa bin Mulappa Aki* v. *Dundaya bin Shivlingaya* referred to.

Mul Chand *v.* Mukta Prasad 83

(12) ———————. (*Stay of execution pending suit between decree-holder and judgment-debtor—Appeal from order staying execution—Civil Procedure Code, ss.* 235 (*d*), 243, 581, 583.)] An appeal lies from an order passed under s. 243 of the Civil Procedure Code staying execution of a decree pending a suit between the decree-holder and judgment-debtor.

The words "such Court" in s. 243 of the Civil Procedure Code do not limit the exercise of the powers given by that section only to decrees passed by the Court in which the suit is pending, but with reference to ss. 235 (*d*), 581, and 583 that Court is empowered to stay execution of decrees transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of appeal.

The plaintiff instituted a suit against defendant for recovery of money and other reliefs which was ultimately dismissed in appeal by the High Court, and he was ordered to pay defendant Rs. 1,000 as costs of the litigation. Plaintiff then brought this suit against defendant in the Court of the Subordinate Judge of Farakhabad, and while it was pending defendant applied to the Court to execute his decree for costs. Plaintiff then applied for stay of execution, and his application was refused by the first Court, but granted by the District Court. On appeal by defendant to the High Court, *held* that an appeal lay from the order, and the Judge's order was correct.

Mithun Bibi v. *Buzloor Khan* disapproved.

Kassa Mal *v.* Gopi 389

(13) ———————. *See* Civil Procedure Code, ss. 244, 201.

EXTORTION—*Personating public servant. See* Several offences.

GUARANTEE, CONTINUING. (*Lease—Guarantee for rent—Liability—Death of surety*). *See* Lease.

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HINDU LAW.—*Custom—Impartible estate—Right of possessor of impartible estate to alienate.*] There is no such coparcenary in an estate impartible by custom, as, under the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth.

The son's right at birth, under the Mitakshara, is so connected with the right to share in, and to obtain partition of the estate, that it does not exist independently of the latter right.

Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.

In regard to a *raj* estate in Gorakhpur, by custom impartible and descending by primogeniture, the family being in other respects governed by the Mitakshara law, the present Raja's alienation of part of that estate was alleged by his son to be invalid as against him.

Held that if there had been no custom of impartibility, the Raja's power over the estate would have been restricted by the law declared in Mitakshara, ch. I, s. 1, v. 27; and the gift would have been void. But, there being the above custom, the question was how far the general law was superseded, and whether the right of the son to control the father's act in this respect was beyond the custom.

Held, that in regard to impartible estate, the son's right at birth did not exist where there was no right on his part to partition; also that inalienability depended on custom, or on the nature of the tenure. In this case, the evidence did not establish that by custom the estate was inalienable.

Sartaj Kuari *v.* Deoraj Kuari 272

(2) ————. *Shares in villages held by wife of former proprietor—Stridhan—Mitakshara—Mutation of names in the settlement record.*] A share in a pattidári village given by a Hindu proprietor to his wife may become her *stridhan*, within the contemplation of the Mitakshara, section 11, cl. 1, enabling her to make a valid gift of it.

A transfer from a husband of a share in a village was not formally carried out, otherwise than by its being evidenced by mutation of names in the settlement record; and a son, claiming as his father's heir, alleged that his mother's name was only used *benami* by the father.

Held, that a finding that such mutation was not for the purpose of putting the property into the name of the wife, *benami* for the husband, but for her own benefit, was substantially correct.

Thakro *v.* Ganga Prasad 197

(3) ————. (*Joint Hindu family—Evidence of separation—Definement of shares in ancestral property.*] A four annas ancestral share in a zamindari village was owned by two brothers, in which the share of *H.* son of one of the brothers was one-half, the remaining half being the share of the plaintiffs the descendants of the other brother. In the village records there had been a definement of shares followed by entries of separate interest in the revenue records and since 1264 fasli the two plaintiffs had each been recorded as the owner of a one anna share and *H.* of a two anna share thereof. The entire four anna share had been in the possession of mortgagees from the year 1844 excepting the sir lands of which *H.* held separately his own share, *viz.*, 10 bighas. On the 7th July 1883, *H.* executed a deed of gift of his two annas share in favour of the defendants, and caused mutation of names to be made in their favour surrendering to them at the same time possession of the sir land. *H.* died on 21st January, 1884, leaving neither son, widow, nor daughter, and the plaintiffs were his heirs at law. They brought this suit to set aside the deed of gift and for possession of the sir land from the defendants. The suit was dismissed by the Court of first instance, and in appeal the District Judge affirmed the decree, holding that the four annas share was not joint and undivided property between the co-sharers, and that *H* was in separate possession of the two annas share of which the defendants were the donees. On second appeal it was contended, that in as much as since 1844 there could have been no separate enjoyment of the four annas

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which was in the possession of the mortgagees, the evidence afforded by separate registration could not prove actual separation. *Ambika Dat* v. *Sukhmani Kuar* was cited in support of the contention.

Held, that from evidence of defilement of shares followed by entries of separate interests in the revenue records, if there be nothing to explain it, separation as to estate may be inferred. Joint family property in the hands of mortgagees may be separated in estate, although there could be no separate enjoyment of the shares so separated.

Ambika Dat v. *Sukhmani Kuar* discussed.

Ram Lal *v.* Debi Dat 490

HINDU WIDOW.—*Adverse possession against widow—Reversioners—Act XV of* 1877 (*Limitation Act*), *sch.* ii, *Nos.* 141, 144.] The plaintiffs sued for possession of certain zamíndári property as reversioners to the estate of one *C*, their right to sue having accrued as alleged by them on the death of the widow of *C*, which took place on 14th October, 1884. The defendant, alleging himself to be the adopted son of *C*, and being in possession of the property in dispute since the death, contended that the claim was barred. The Court of first instance dismissed the claim as barred by art. 118 of the Limitation Act, and, in appeal, the District Judge held the claim was barred by defendants adverse possession over the property for more than twelve years. On second appeal it was contended that the suit being by a Hindu entitled to possession as a reversioner on the death of a female, was governed by art. 141 of the Act and therefore not barred. *Held*, that as on the facts found the adopted son held adversely to the widow, adverse possession which barred the widow barred also the reversioners and therefore the claim was barred. The *Shiva Ganga Case* was referred to.

The following cases were cited in the course of the argument, *Raj Bahadoor Singh* v. *Achambit Lal*, *Jagadamba Chowdhrani* v. *Dakhina Mohun*, *Rajendranath Holder* v. *Jogendro Nath Banerjee*.

Gandharap Singh *v.* Lachman Singh 485

(2) ———————. (*Gift of immoveable property by husband—Life-interest—Heritable interest—Alienable interest—Appeal—Practice—Change of pleading in appeal.*)] The plaintiff, alleging himself to be joint in estate with *A*, his grand-uncle, sued to set aside an absolute gift of the house in suit made by *A* in favour of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower appellate Court, finding that *A* was separate in estate from plaintiff and the sole and exclusive owner of the house, held the gift to the wife and the sale by her to defendant valid, and dismissed the suit. On appeal to this Court plaintiff contended that he was the heir of the donee and that under the deed of gift she had no power to alienate.

Held, that the case put forward in second appeal being totally different from that which was originally put forward and tried, the appeal should be dismissed.

Held further that from the wording of the deed of gift it appeared that the husband intended to give and did give to his wife an heritable estate in and power of alienation over the property the subject of the gift, and therefore the sale by the wife was valid.

Kunjbehari Dhar v. *Prem Chand Datt*, referred to.

Kanhia *v.* Mahin Lal 495

(3) ———————. (*Gift by Hindu widow of her own interest and that of consenting reversioner.*)] A Hindu widow in possession can, with the consent of a reversioner, make a valid gift which will operate so far as the interest of the widow and that of the consenting reversioner are concerned. *Rany Srimuty Debeah* v. *Rany Koond Lata Kooer*, *Goolab Singh* v. *Rao Kurun Singh*, *Sia Dasi* v. *Gur Sahai* and *Raj Bullubh Sen* v. *Oomrah Chunder Rooz* referred to.

Ramphal Rai v. *Tula Kuari* distinguished.

Ramadhin *v.* Mathura Singh 497

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HYPOTHECATION.—*Moveable property—Non-existent moveables—Contract to assign after-acquired chattels—Completion of assignment on property coming into existence—Transferee with notice of hypothecation—Suit against transferee for damages for wrongful conversion—Measure of damages.*] *Held* upon principles of equity, that a hypothecation of certain future indigo produce was a valid contract to assign such produce when it should come into existence; and that the hypothecation became complete when the crop was grown and the produce realized; and was enforcible against a transferee of such produce with notice of the obligee's equitable interest. *Collyer* v. *Isaacs* and *Holroyd* v. *Marshall* referred to.

Held also that such an interest would not avail against a transferee without notice. *Joseph* v. *Lyons* and *Hallas* v. *Robinson* referred to.

In a suit against such a transferee with notice, who had sold the produce for damages, for wrongful conversion of the security,—*held* that the measure of damages, under ordinary circumstances, and where a fair price had been obtained, would be the amount which the defendant had realized by the sale. *Misri Lal* v. *Mazhar Hossain* referred to.

Bansidhar v. Sant Lal 183

———————"*Moveable property.*" *See* Registration.

IMPARTIBLE ESTATE. *See* Hindu Law (1).

INDEMNITY. (*Lease—Guarantee for rent—Liability—Act IX of* 1872, *ss.* 124, 125, *clause* (2)). *See* Lease.

INFLUENCE, UNDUE. (*Voluntary transfer—Act IX of* 1872 (*Contract Act*), *s.* 16.) *See* Voluntary transfer.

INHERITANCE. *Muhammadan Law. See* Limitation (3) *and* Muhammadan Law (2)

INJUNCTION, TEMPORARY. *See* Civil Procedure Code, s. 492.

INTERVENOR. *Rent suit. See* Rent Act.

JOINT DECREE. (*Purchase by judgment-debtor of rights of some of the joint decree-holders—Decree extinguished* pro tanto). *See* Execution decree (9).

JOINT HINDU FAMILY. (*Evidence of separation—Defacement of shares in ancestral property.*) *See* Hindu Law (3).

———————————. (*Res judicata.*)] *See* Civil Procedure Code, *s.* 13, explanation V.

JURISDICTION—*Civil and Revenue Courts. See* Partition.

———————————. (*Valuation of suit*). *See* Act XV of 1877, s. 5.

———————————, PRESUMPTION OF. *See* Civil Procedure Code, s. 622.

———————————, OF CIVIL COURTS. *See* Landholder and Tenant (1).

LANDHOLDER AND TENANT. *Agreement by occupancy tenant to relinquish his holding—Agreement not enforceable—Suit for specific performance of agreement—Jurisdiction of Civil Courts.*] The defendant, who was a tenant with a right of occupancy in the land cultivated and held by him, executed a *kabuliat* in respect of the said land in favour of the plaintiffs (his landlords), agreeing that on the expiry of the term fixed in the *kabuliat* he should have no claim to retain possession of the cultivatory holding, but that he should give it up. Plaintiffs sued for ejectment of the defendant on the basis of the agreement, and obtained a decree from the lower appellate Court. On second appeal by the defendant,

Held that inasmuch as the plaintiffs sought to enforce the covenant contained in the *kabuliat* in such a manner as to extinguish the rights of occupancy found upon the facts of the case to have been acquired by the defendant in the land in suit, such suit must fail, as opposed to the policy of the law as shown in the provisions of s. 9 of the Rent Act (Act XII of 1881). Such a tenant may be ousted from his holding by enforcement of the remedies given in that behalf in s. 95 (*d*) and (*f*), but not in the manner sought by the plaintiff in this action.

Kauri Thakurai v. Ganga Narain Lal 615

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(2) LANDHOLDER AND TENANT.—*Notice of ejectment—Determination of tenancy—Act XII of* 1881, *ss.* 86, 39 *(c)* 40—*Suit for ejectment and mesne profits—Payments by wrong-doer in possession not to be deducted from such profits.*] S. 39 (c) and s. 40 of the N.-W. P. Rent Act (XII of 1881) imply that if a landholder has failed to give his tenant the written notice of ejectment required by s. 86, the tenancy is not to be treated in law as having ceased on determination of the term provided, but is to be treated as still subsisting.

Where upon the expiry of the term of a lease, but without the written notice of ejectment required by s. 86 of the Act having been given by the lessor, possession was taken and rents collected by persons claiming under a subsequent lease—*held* that the tenancy of the first lessee did not cease upon the determination of the term of their lease, that the second lessees were wrong-doers in usurping possession and collecting rents and profits, and were liable in a suit for damages by way of mesne profits after deduction of a sum paid by them for Government revenue, but without deduction of what they had paid the lessor or of the expenses they had incurred in collecting the rents.

Shitab Dei *v.* Ajudhia Prasad 13

(3) ——————————. *Occupancy tenant—Trees, sale of—Such sale invalid—Act XII of* 1881, *s.* 9.] The trees upon an occupancy holding, whether planted by the tenant himself or not, belong and attach to such holding, and, like it, are not susceptible of transfer by the tenant.

Imdad Khatun *v.* Bhagirath 159

LEASE. (*Guarantee for rent—Indemnity—Liability—Continuing guarantee—Death of surety—Act IX of* 1872, *ss.* 124, 125, *clause* (2), 126, 130; 131.)] One *B* proposed to take a lease of zamíndári property from *M* for the period of eight years at a rental of Rs. 3,900 per annum. *M* declined to grant the lease until the payment of rent during the term of eight years was guaranteed by one *S*, the father of the plaintiff. *S* on his part required a guarantee or indemnity against any rent which might not be paid by *B*, and which he might under his proposed guarantee become liable to pay. The defendant's father, *G*, accordingly gave a guarantee to *S* in the following terms: "And for your satisfaction, I write that if any money remains due from *B* on account of the lease for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." *S* then gave his guarantee to *M*, and he granted the lease to *B*. *G* died on 22nd May, 1880. *B* failed to pay the rent due for the year 1883. *M* having died, his representatives sued *S* on his guarantee and recovered from him the rent due and certain costs and expenses. *S* then died, and the plaintiff, as his representative, brought this action against defendant, the legal representative of *G*, to recover the amount of the decree and costs which *S* had to pay. The Court of first instance decreed the whole claim with costs to be recovered from the estate of *G*, and this decree was confirmed in appeal by the District Judge.

On second appeal it was contended that under s. 131 of the Indian Contract Act, the death of *G* was a complete answer to the claim.

Held, that assuming that the case was that of a continuing guarantee within the meaning of s. 131 of the Indian Contract Act, still, having regard to the object for which the two guarantees were given, it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that *S* should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay, and consequently, even if it were a continuing guarantee, the liability of *G* was not determined on his death.

Held further, that neither *G*, if he were alive, nor on his death the defendant, as his representative, could be made liable for costs and expenses which *S* had incurred in defending the previous suit against him for

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rent brought by the lessor, there being no evidence to show that *S* acted as a prudent man would have done in defending the action against him or was authorized by defendant to defend the suit.

Lloyds v. Harper referred to.

Gopal Singh v. Bhawani Prasad 531

LEASE. (*Trespass—Right to sue—Special damage.*) *See* Public thoroughfare.

LEGITIMACY. *See* Muhammadan Law. (2)

LIFE-INTEREST. (*Heritable interest—Alienable interest*). *See* Hindu widow. (2)

LIMITATION. (*Acknowledgment signed by one of several partners*).] *See* Act XV of 1877, s. 21.

———. *Sanction to prosecution—Application for such sanction—Criminal Procedure Code, s.* 195—*Act XV of* 1877 *(Limitation Act), sch. ii., art.* 178.] Rules of limitation are foreign to the administration of criminal justice, and it is only by express statutory provision that any rule of limitation could be made applicable to criminal cases.

Article 178, sch. ii., Limitation Act (XV of 1877), must be construed with reference to the wording of the other articles, and can relate only to applications *ejusdem generis*.

A suit was instituted for possession of certain land on which stood a factory. In proof of the claim the plaintiffs filed in Court a *sarkhat* or lease, which was pronounced by the Munsif to be a forgery. Plaintiffs appealed up to the High Court, where on the 21th June, 1886, the Munsif's decree was affirmed. Defendants then applied to the Munsif for sanction to prosecute the plaintiffs for the offence of using a forged document knowing the same to be forged. Munsif refused to sanction the prosecution prayed for; but on application to the Sessions Judge, such sanction was granted. On application to revise the Sessions Judge's order granting sanction, it was contended that, after the lapse of nearly three years, sanction to prosecute should not have been granted.

Held that there is no fixed period of limitation for making applications for sanction under section 195 of the Criminal Procedure Code.

Queen-Empress v. Ajudhia Singh 350

(2)———. *See* Act XV of 1877, sch. ii, No. 179 (4), *and* Civil Procedure Code, ss. 373, 374, 647.

(3)———. *Suit by Muhammadans for possession of immoveable property by right of inheritance to mother.*] Plaintiffs sued for their share in the estate of their deceased father and mother. The defendants were the brother and a sister and a step-mother of the plaintiffs. As regards the claim of the plaintiffs to their shares in the estate of their mother, the defendants pleaded that the same was barred by limitation, inasmuch as their mother died on the 22nd January, 1873, and the suit was not instituted till the 29th of January, 1885. The Court below finding that the mother died on the 22nd January, 1873, held that art. 141, sch. ii, Limitation Act, barred the claim, and dismissed the suit.

Held that art. 141 of the Limitation Act does not apply to a suit by an heir-at-law for possession of immoveable property in that character, but to a suit by a Hindu or Muhammadan who, prior to the death of a female, occupied the position of a remainder-man, or reversioner or a devisee; and on the death of the female sues on the basis of that character.

Hashmat Begam v. Mazhar Husain 343

MAXIM. OMNIA PRÆSUMUNTUR RITE ET SOLEMNITER ESSE ACTA. *See* Civil Procedure Code, s. 622.

MESNE PROFITS. *Sale by occupancy-tenant—Decree in favour of landholder against purchaser for mesne profits—Mesne profits how to be assessed. See* Occupancy tenancy.

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MORTGAGE. *Decree for sale—Decree not to be treated as a money-decree—Act IV of* 1882, *ss.* 88, 89, 90.] A decree in favour of a mortgagee for sale of the mortgaged property cannot be treated as one for money. According to the Transfer of Property Act, ss. 88, 89, and 90, the mortgagee must first sell the mortgaged property, and if the net proceeds of such sale be insufficient to pay the amount due for the time being on the mortgage, and if the balance be legally recoverable from the mortgagor otherwise than out of the property sold, he may ask the Court for a decree for such balance.

Gopal Das *v.* Ali Muhammad 632

(2)————. *Mortgagee of non-transferable property—Right to sue for mortgage-money. See* Act IV of 1882, s. 68 *(b), (c).*

((3————. *Payment by mortgagee by conditional sale of prior mortgage—Decree obtained by intermediate simple mortgagee for sale—Mortgage by conditional sale foreclosed—Intermediate simple mortgagee not entitled to sell without paying first mortgage.*] B made two mortgages, dated respectively the 10th October, 1871, and 10th October, 1872, of his zamindari property in favour of *P*. On 27th January, 1874, B mortgaged 117 bighas 7 biswas and 10 dhurs of *sir* and cultivatory land belonging to his zamindari for Rs. 700 to the defendant. On 10th September, 1877, *B* made a conditional sale of his zamindari property to the plaintiff for Rs. 4,500 to pay off the two charges created in favour of P. On the 10th August, 1878, B made another mortgage to the defendant for Rs. 300 of the same 117 bighas 7 biswas and 10 dhurs. On the 9th November, 1881, defendant obtained a decree on his two bonds of the 27th January, 1874, and 10th August, 1878, and on his application for execution of the decree, the property mortgaged to him was advertised for sale on the 20th November, 1883. Meanwhile the plaintiff had taken the necessary proceedings to foreclose his conditional sale, and upon the 19th March, 1883, the sale was foreclosed. On the 19th November, 1883, plaintiff instituted this suit with the object of having it declared that defendant was not entitled to bring to sale the property mortgaged to him.

Held that by the conditional sale, which became absolute upon the 19th March, 1883, the plaintiff acquired all the rights that subsisted under the two mortgages of the 10th October, 1871, and 10th October, 1872, and was entitled to press those securities in his aid as prior incumbrances to that of the defendant, for the purpose of stopping him from bringing the property to sale in execution of his decree before first recouping the plaintiff the amount which the latter found to satisfy and discharge those incumbrances.

Held further that the only right which the defendant had to bring the property to sale was upon the strength of the decree obtained in the bond of 27th January, 1874, for he had no right under the instrument in his favour of the 10th August, 1878. The defendant should therefore only be permitted to bring the property to sale under his decree in respect of the mortgage of 27th January, 1874, when he had satisfied and discharged the two mortgage bonds held by the plaintiff of the 10th October, 1871 and 10th October, 1872.

Zalim Gir *v.* Ram Charan Singh 629

(4)————. *Redemption before expiry of term—Mortgagor entitled to redeem before expiration of term unless mortgagee can show that the term binds mortgagor—Usufructuary mortgage.*] No such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the debt due by him to the mortgagee. Where parties agree that possession of any property shall be transferred to a mortgagee by way of security and repayment of the loan for a cer-

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tain term, it may be inferred that they intended that redemption should be postponed until the end of the term, though the creation of a term is by no means conclusive on the point.

The term fixed for payment of a debt should be presumed to be a protection only for the debtor till a contrary intention is shown.

Bhagwat Das v. Parshad Singh 602

(5) MORTGAGE. (*Sale of equity of redemption—Suit by mortgagee for sale of mortgaged property—Purchaser not a party to suit—Sale of mortgaged property in execution of decree obtained by mortgagee—What passed—Right of purchaser of equity of redemption—Redemption.*)] On the 21st December, 1871, three of the defendants in this suit mortgaged four groves to *H*. In 1872 the plaintiffs obtained a money-decree against one *D*, and in August, 1872, in execution of that decree, sold the said groves, and at the sale purchased them and also two mills which were not in dispute in this suit. The decree against *D* was found to have the same effect as if it were had and obtained against all the mortgagors. Of this sale *H* had notice, and he opposed it. Subsequently *H*, the mortgagee, sued the mortgagors on their mortgage, and obtained a decree on it, and under the decree brought the said groves to sale in 1877, and purchased them himself. In May, 1880, *H* sold the groves to two of the defendants. The plaintiffs who were not parties to the suit which resulted in the decree under which the groves were sold in 1877, instituted this suit for possession of the groves.

Held, that notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title, and interest of the mortgagors, as they existed at the date of the mortgage of 21st December, 1871, with which would go the rights and interest of the mortgagee; and although at a sale under a decree for sale by a mortgagee the right, title and interest of the mortgagor which is sold is his right, title and interest at the date of the mortgage, and any right, title and interest he may have acquired between the date of mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of mortgagee's decree, and who was not a party to the suit in which the mortgagee obtained his decree, would have the right to redeem the property which the mortgagor would have had but for the decree. This view is consistent with the principles of equity and recognised by the Transfer of Property Act.

Muhammad Sami-ud-din v. *Man Singh* followed.

The following cases were referred to and considered in the judgment:—

Abdulla Saibo v. *Abdulla Mohan*, *Manon* v. *Togu Uka*, *Khub Chand* v. *Kalian Das*, *Ali Hasan* v. *Dhirja*, *Sita Ram* v. *Amir Begam*, *Bhup Singh* v. *Gulab Rai*, *Ramanath Das* v. *Bolaram Phookun*, *Naran Purshotam* v. *Dolatram Virchand*.

Gajadhar v. Mul Chand 520

(6) ——— ———. *Usufructuary mortgage—Covenant by the mortgagor to pay the mortgagee arrears of rent due at the time of redemption—Payment by mortgagee of arrears of revenue—Right of mortgagee to re-imbursement before redemption.*] On the 27th August, 1883, M and B jointly executed two usufructuary mortgages for the sums of Rs. 3,000 and 5,000 respectively in favour of the defendants. On the 24th March, 1886, the mortgagors executed another usufructuary mortgage in favour of the plaintiffs for Rs. 15,000, entitling them to possession of the property mortgaged. The second mortgagees instituted a suit to redeem the prior mortgages by depositing in Court the principal sum of Rs. 8,000. The defendants urged that a sum of Rs. 4,000 was due to them besides the principal amount, without payment of which the property in suit could not be redeemed. The Court found that a sum of Rs. 498-15-9 only composed of certain arrears of rent, and an item of arrears of Government revenue paid by the defendants was due to them, and decreed

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redemption of the property on condition of payment of the aforesaid sum. Both the parties appealed.

Held that the items of arrears of rent were recoverable under the covenant contained in that behalf in the mortgage deeds; as to the item for arrears of Government revenue, it was clear that unless this revenue was duly paid the whole estate might have been sold to realize it, thereby putting an end to all the rights of the mortgagors and mortgagees; and therefore upon the general principles of law upon which the doctrine of salvage and subrogation proceeds, persons in the position of mortgagees in possession are entitled to claim that sum before the property which they saved from sale for arrears of revenue could be redeemed.

Girdhar Lal *v.* Bhola Nath 611

MORTGAGE. *See* Act IV of 1882, ss. 86, 87, 94.
"MOVEABLE PROPERTY." *See* Registration.
MUHAMMADAN LAW. *Inheritance. See* Limitation (3).

(2) ———————————*Inheritance—Legitimacy—Acknowledgment of sonship.*] *Per* EDGE, C. J., and STRAIGHT, J.—The rules of the Muhammadan law relating to acknowledgment by a Muhammadan of another as his son are rules of the substantive law of inheritance. Such an acknowledgment, unless certain impediments exist, confers upon the person acknowledged the status of a legitimate son capable of inheriting. Where there is no proof of legitimate birth or of illegitimate birth, and the paternity of a child is unknown, in the sense that no specific person is shown to be the father, then the acknowledgment of him by another who claims him as a son affords a conclusive presumption that he is the legitimate child of the acknowledger, and places him in that category. Such a status once conferred cannot be destroyed by any subsequent act of the acknowledger or of any one claiming through him

Per MAHMOOD, J.—Although, according to the Muhammadan law, *ikrar* or acknowledgment in general stands upon much the same footing as an admission as defined in the Evidence Act, acknowledgments of parentage and other matters of personal status stand upon a higher footing than matters of evidence and form a part of the substantive Muhammadan law. So far as inheritance through males is concerned, the existence of consanguinity and legitimate descent is an indispensable condition precedent to the right of succession, and such legitimate descent depends upon the existence of a valid marriage between the parents. Where legitimacy cannot be established by direct proof of such a marriage, acknowledgment is recognized by the Muhammadan law as a means whereby marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of a lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledger, and there is nothing in the Muhammadan law similar to adoption as recognized by the Roman and Hindu systems, or admitting of an affiliation which has no reference to consanguinity or legitimate descent. A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimatised by acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time, with reference to the legitimacy of the child's birth, is a matter of uncertainty.

Ashruf-ood-Dowlah Ahmed Hossein Khan v. *Hyder Hossein Khan, Muhammad Azmat Ali Khan* v. *Lalli Begum* and *Sadakat Hossein* v. *Mahomed Yusuf*, referred to.

Muhammad Allahdad Khan v. Muhammad Ismail Khan ... 289

(3) ———————————. (*Wajib-ul-arz—Pre-emptor out of possession of his own share—His own share lost pending appeal.*) *See* Pre-emption (6).

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NOTICE. *See* Act IV. of 1882, s. 131.
———OF EJECTMENT. *See* Landholder and tenant (2).
NUISANCE, PUBLIC.—*Slaughter of kine by Muhammadans on their own property.* *See* Act XLV of 1860, ss. 268, 290.
OATH OR AFFIRMATION. *See* Act X of 1873, ss. 6, 18.
OCCUPANCY TENANCY. *Sale by occupancy-tenant—Decree in favour of land-holder against purchaser for mesne profits—Mesne profits how to be assessed.*] Where in a suit against an occupancy tenant and his vendor, the zamindar obtained a decree for cancelment of the deed of sale, for possession of the land by ejectment and for mesne profits from the date of suit to the date of recovery of possession :—*Held* that the mesne profits awarded must be assessed as damages against the vendee as a trespasser and that the proper measure of such damages was not the rent which was payable by the vendor, but the actual market value of the land for the purposes of letting.

Matuk Dhari Singh *v.* Ali Naqi 15

———TENANT. *Sale of trees—Act XII of* 1881, *s.* 9. *See* Landholder and tenant (3).
PARTITION. *Jurisdiction—Civil and Revenue Courts—Suit for partition and possession of a share in a particular plot in a patti—Act XIX of* 1873, *ss.* 135, 241 (*f*).] A suit by a co-sharer in a joint zamindari estate for partition and possession of his proportionate share of an isolated plot of land is not maintainable in a Civil Court, with reference to ss. 135 and 241 of the N.-W. P. Land Revenue Act (XIX of 1873). *Ram Dayal* v. *Megu Lal* distinguished.

Ijrail *v.* Kanhai 5

"PATTIDARS." *See* Pre-emption (5).
PERSONAL INSULT. (*Cause of action—Verbal abuse—Special damage—Witness—Privilege.*)] *See* Defamation.
PERSONATING PUBLIC SERVANT.—*Extortion.* *See* Several offences.
PRACTICE. (*Appeal—Change of pleading in appeal.*) *See* Hindu widow (2).
(2) ———, *Issue raised by Court which was not raised by parties.*] The plaintiffs in a suit denounced in the plaint their two signatures to a sale-deed as forgeries, and never alleged that they witnessed it under pressure. The Court of first instance found them to be genuine, and the lower appellate Court, while agreeing with the Court below in its findings upon the question of the genuineness of the signatures, observed that they were obtained under pressure, and so reversed the decree of the Court below. On second appeal to the High Court,

Held that Courts are not to raise important and serious issues in a case for the parties when they have not raised it themselves by their own pleadings in the cause.

Wali-ul-lah Khan *v.* Muhammad Israr-ul-lah Khan ... 627

(3) ———*Remand by lower appellate Court under Civil Procedure Code, s.* 566—*No objection filed by plaintiffs under s.* 567—*Objections raised for the first time in second appeal by plaintiffs—Such objections not entertainable.*] Objections which might have been but were not made under s. 567 of the Civil Procedure Code in a lower appellate Court to the findings on remand of the Court of first instance, cannot be raised for the first time as grounds of second appeal from the lower appellate Court's decree.

Muhammad Abdul Hai *v.* Sheo Bishal Rai 28

(4) ———. *Remand—Power of appellate Court to deal with whole appeal after return of findings.*] In a second appeal by the defendant, in which the plaintiff filed objections to the decree under s. 561 of the Civil Procedure Code, the High Court, without giving judgment on the appeal, stated (giving reasons) the opinion that the appellant would be entitled

to succeed, and at the same time remitted an issue under s. 566 of the Code with reference to the plaintiff's objections. At that time the appeal was apparently not argued out, and the true meaning of the facts as found was obviously not present to the mind of the Court.

Held that upon the return of the findings on remand the Court could not treat the appeal as already decided and the objections the sole matter for consideration, but must consider both appeal and objections and decide the whole case.

Held, however, that where Judges have heard arguments on some of the issues and have expressed their views thereon and have remitted another issue or issues under s. 566, they are not bound, on the return of findings, to hear the case *de novo*, but may confine counsel to argument upon the findings.

Lachman Prasad *v.* Jamna Prasad 10

(5) PRACTICE. *Revision—Criminal Procedure Code, s. 438—Reference by Magistrate of orders passed by Sessions Judge.*] A Magistrate is not justified in referring under s. 438 of the Criminal Procedure Code orders passed by the Sessions Judge on appeal, except in very special cases. *Queen-Empress* v. *Shere Singh* referred to.

Queen-Empress *v.* Zor Singh 140

(6) ———— *See* Civil Procedure Code, ss. 562, 563, 564, 566.

PRE-EMPTION. (*Conditional decree—Appeal—Purchase-money—Costs—Civil Procedure Code, ss. 214, 583.*)] *See* Civil Procedure Code, s. 214.

(2) ————*—Rival suits—Each pre-emptor made defendant in the other's suit—Suits tried together, but decided by separate decrees—Decree allowing pre-emption in one case only on condition of default by other pre-emptor—Finality of decree in superior pre-emptor's suit—Appeal by inferior pre-emptor in his own suit—Appellate Court not competent to alter decree so as to affect superior pre-emptor's right.*] In two rival suits for pre-emption each pre-emptor was made a defendant in the other's suit. The suits were tried together upon the same evidence and were disposed of by a single judgment, but by separate decrees. In one of the suits the pre-emptor obtained a decree in the terms of s. 214 of the Civil Procedure Code. In the other, the pre-emptor obtained a decree, subject to the condition that, in the event of the first pre-emptor failing to execute his decree, the second pre-emptor should be entitled to execute it. The decree in the first suit was not appealed, and became final. The second pre-emptor appealed from the decree in his own suit, upon the grounds that the amount ordered to be paid was excessive, and that the first pre-emptor had lost his right, and the decree in the second suit should not have been made subject to the condition above stated.

Held that the appellant, if he desired to get rid of the decision regarding the first pre-emptor's preferential right, should have appealed against the first pre-emptor's decree, but that that decree having become final, the questions between the two pre-emptors could not be re-opened on appeal from the second pre-emptor's decree.

Chajju *v.* Sheo Sahai 123

(3) ————. (*Town—Custom—Evidence—Decrees enforcing right.*)] In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied, is admissible to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom.

Gujju Lal v. *Fateh Lal* distinguished. *Koodoottoollah* v. *Mohinee Mohun Shaha Sheo Churn* v. *Goodur*, and *Lachman Rai* v. *Akbar Khan*, referred to.

Gurdayal Mal *v.* Jhandu Mal 585

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(4) PRE-EMPTION. *Wajib-ul-arz—Clause fixing price in case of sale to a co-sharer—Agreement running with the land—Pre-emptor entitled to take properly on payment of price fixed in wajib-ul-arz.*] The pre-emptive clause in the *wajib-ul-arz* of a village contained a provision that the right of pre-emption could be enforced on payment of such sum as would represent the "*kimat-i-muruwajah*," that is, according to current rates. A suit for pre emption was brought against the vendor and vendee of a certain fractional share in the village, and the plaintiff claiming the benefit of the above provision, disputed the price entered in the sale-deed as the proper price for the share according to current rates.

Held, following *Karim Bakhsh Khan* v. *Paula Bibi*, that a co-sharer was entitled to purchase the share sold at a price to be ascertained according to the rule in that behalf contained in the *wajib-ul-arz*, and the condition in the *wajib-ul-arz* regarding the price to be paid for the share sold was binding on the land and therefore binding on the stranger vendee.

Upmani Kuar v. Ram Din 621

(5) ——————. *Wajib-ul-arz—"Pattidars"—"Chakdars."*] *Held* that the terms of a *wajib-ul-arz* conferring a right of pre-emption upon "*pattidars*" did not apply to a *chakdar* holding a share in the same *chak* as the vendor.

Balwant Singh v. Subhan Ali 107

(6) ——————. (*Wajib-ul-arz—Pre-emptor out of possession of his share—His own share lost by him pending appeal—Muhammadan Law.*)] The plaintiff instituted this suit to enforce her right of pre-emption in respect of a share in a village of which she alleged herself to be a co-sharer with the vendors. The defendants to the suit were the vendors the vendees, and others who were rival claimants for pre-emption in the share sold. The rival pre-emptors alone defended the action on the ground, among others, that plaintiff was not in possession of her own share in the village out of which she alleged that her right to claim pre-emption arose. The Court of first instance dismissed her suit. In appeal the District Judge in effect dismissed her claim as against the defendants who were the rival pre-emptors, but gave her a right to obtain the share if the other pre-emptors did not avail themselves of the decree which they had obtained in their action. On the 12th of January, 1887, plaintiff's second appeal was admitted, and on the 20th January plaintiff's share in the village out of which her claim to pre-emption in respect of the share sold arose, was sold in execution of a decree in another suit. Respondent contended that, as since the appeal the share out of which plaintiff alleged that her right arose was sold, she could not get any decree now in her favour.

Held, that this Court as a Court of Appeal had only to see what was the decree which the Court of first instance should have passed, and if the Court of first instance had wrongly dismissed the claim, the plaintiff cannot be prejudiced by her share having been subsequently sold in execution in another suit; such a sale could not have affected her right to maintain the decree, if she had obtained a decree in her favour in the Court of first instance, either on review or on appeal, nor could it have been made the ground of appeal. Further, plaintiff being out of her possession of her share at the time she instituted the suit for pre-emption was immaterial, the Court should have ascertained whether the plaintiff was at the date of suit entitled in law to the share out of which her right of pre-emption was alleged to have arisen.

Held, by Mahmood, J., that the passage from Hamilton's Hedaya by Grady, p. 502, means that in the pre-emptive tenement the pre-emptor should have a vested ownership and not a mere expectancy of inheritance or a reversionary or any kind of contingent right, or any interest falling short of full ownership.

Sakina Bibi v. Amiran 472

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(7) PRE-EMPTION. *Wajib-ul-arz—Rival suits—Decree not to allow either claimant to pre-empt part only of the property over which he has a pre-emptive right.*] Where two rival pre-emptors, each having an equal right, to claim pre-emption under a *wajib-ul arz*, bring suits to enforce their rights, in the absence of anything in the *wajib-ul-arz* to the contrary, the rule of Muhammadan law must be observed, and, however the property may be divided by the decree of the Court between the successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on the default of one by the other, or that neither of them should obtain any interest in the property in respect of which the suits were brought.

In two rival suits for pre-emption, the Court gave one claimant a decree in respect of a three annas share, and the other a decree in respect of a two annas six pies share of certain property, each decree being conditional on payment of the price within thirty days. The Court further directed that in case of either pre-emptor making default of payment within the thirty days, the other should be entitled to pre-empt his share on payment of the price thereof within fifteen days of such default. Both pre-emptors made default of payment within the thirty days. One of them, within the further period of fifteen days, paid into Court the price of the share decreed in favour of the other and claimed to pre-empt such share.

Held (affirming the judgment of MAHMOOD, J.) that the claim was inadmissible, since to allow it would have the effect of defeating the rule of law that a pre emptor must buy the whole and not part only of the property which he is entitled to pre-empt.

Arjun Singh *v.* Sarfaraz Singh 182

PRIVACY. *Right of—Custom.* *See* Easement.

PUBLIC THOROUGHFARE. (*Obstruction—Right to sue—Special damage—Lease—Right of lessee—Trespass.*)] The plaintiff, a holder of a ten years' lease of the share and rights of one of the co-sharers of a village, sued for the demolition of certain buildings and constructions on a plot of land within the area of the village, on the ground, that the public had been very much inconvenienced in going to and coming from the road and in taking carts, carriages, cattle, &c., and that he by reason of his own inconvenience, and also as lessee in possession of the entire rights of his lessor, had legally and justly a right to bring the action. The findings of fact were that by the terms of the lease plaintiff was entitled to maintain the action as representing the zamindari rights of his lessor; that the obstructions complained of existed when the lease was granted; that the roadway mentioned in the plaint was one used by the public in general as a foot-path and also for vehicles, and that the buildings complained of had encroached on the road. The suit was dismissed by the first Court, but decreed in appeal by the lower appellate Court. *Held*, that in the absence of damage over and above that which in common with the rest of the public the plaintiff had sustained, his action must fail. Public nuisance is actionable only at the suit of a party who has sustained special damage, and the case law of British India in this respect is the same as the rule of English law on the subject. Further, that the lease to plaintiff failed to show either that the land upon which the defendant had built was included in the lease, or that it intended to confer upon the plaintiff any right to question the legality of the erections existing at the time of the lease.

Satku v. Ibrahim Aga and *Karim Bakhsh v. Budha* referred to

Ramphal Rai *v.* Raghunandan Prasad 409

PUBLIC WAY. (*Obstruction by building—Suit by zamindar for removal of building—Special damage.—Right to sue.*)] The plaintiff, who was the zamindar of the village, brought an action claiming to have a chabutra or building erected by the defendant in one of the village roads removed. The road in question was a *kaloha* road used by the village over which the

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public had a right of way, and it had been dedicated as a road for the use and convenience of the general public. The plaintiff got a decree for the removal of the chabutra, and the defendant appealed.

Held, that the rule of English law that a member of the public cannot maintain an action for obstruction to a public road without showing special injury to himself beyond that suffered by any member of the public, does not apply to a zamíndár who or whose predecessor in title had dedicated the road over his zamíndári land. A zamíndár in giving the public right of road of way over his land does not give the public or any one else a right to interfere with the soil of the road, nor by erecting a building upon it. In such a case the zamíndár has in common with the public the right to use the road as a road: over and above it, he has a right to the soil in the road, which he had never given to the public. In an action of this kind, the zamíndar does not sue as a guardian of the public, but in respect of an interference with his own rights of property.

Baroda Prasad Mustafee v. *Gorachand Mustafee* discussed.

Dovaston v. *Payne*, *R.* v. *Pratt*, *Rolls* v. *Vestry of St. George the Martyr Southwark*, and *Goodson* v. *Richardson* referred to.

Tota *v.* Sardul Singh. 553

QUESTION FOR COURT EXECUTING DECREE. *See* Civil Procedure Code, ss. 244, 291.

REDEMPTION. (*Sale of equity of redemption—Right of purchaser of equity of redemption*). *See* Mortgage (5).

REGISTRATION. *Hypothecation*—"*Moveable Property*"—*Act I of* 1868 *s.* 2 (6).—*Act III of* 1877, *ss.* 2, 17—*Act IV of* 1882, *ss.* 3, 54.] *Held* that an assignment by endorsement of a registered bond hypothecating certain crops was a transaction relating to moveable property, and registration of such endorsement was not required by s. 17 of the Registration Act (III of 1877) or s. 54 of the Transfer of Property Act (IV of 1882).

Kalka Prasad *v.* Chandan Singh 20

REMAND. *See* Civil Procedure Code, ss. 562, 563, 564, 566 *and* Practice (4).

RENT ACT. *Act XII of* 1881 *(N.-W. P. Rent Act), ss.* 84, 148—*Suit to contest demand of distrainer.*] Decree of a Rent Court passed upon enquiries made under ss. 84 and 148 of the Rent Act (XII of 1881), is not conclusive as between the parties to the enquiry, upon the question of title, in a suit instituted in a Civil Court for declaration of right to, and possession of the land, in respect of which the Rent Court decree was passed.

The period of limitation for instituting a suit in the Civil Court as prescribed in these sections, applies only to suits brought by plaintiff or unsuccessful intervenor to have it declared, that plaintiff had a title to receive the particular rent claimed, and which the Rent Court has refused to give him; and not to suits for declaration of title to, and possession of, the land in respect of which the rent accrued due.

In the year 1881, plaintiffs had under the provisions of the Rent Act (XII of 1881), made a distraint for rent alleging to be due by one of their tenants. The tenant contested the legality of the distraint by a proceeding in the Rent Court, and the defendant intervened on the ground that he had been actually and in good faith in receipt and enjoyment of the rent of the land occupied by the tenant. On the 28th of June, 1881, the Rent Court decided against the defendant; but owing to some irregularity the distraint was withdrawn. Plaintiffs subsequently instituted a suit in the Rent Court against the tenant for recovery of arrears of rent and the defendant again intervened, and upon enquiry under s. 148 of the Rent Act (XII of 1881), plaintiffs' suit for arrears of rent was dismissed. Plaintiffs then instituted this suit in the Civil Court for declaration of their right to, and possession of, the land in respect of which distraint proceedings had been taken and suit for recovery of arrears of rent instituted. The Court of first instance dismissed the suit on the merits. The plaintiffs appealed and urged, *inter alia*, that the

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defendant was estopped by the decision of the 26th June, 1881 from contesting plaintiff's title.

Held that the decision of the 26th June, 1881, in the enquiry held under s. 84 of the Rent Act (XII of 1881) was not conclusive between the parties in a subsequent suit between them to determine their title to the land in respect of which the distraint proceedings had been taken.

Ganga Prasad *v.* Baldeo Ram 347

RES JUDICATA. (*Joint Hindu family—Suit against two members—Second suit against third member.*)] *See* Civil Procedure Code, s. 13, Explanation V.

REVERSIONER. (*Hindu widow—Adverse possession against widow—Act XV of 1877, sch. ii, Nos.* 141, 144.) *See* Hindu widow (1).

SALE IN EXECUTION OF DECREE. *Effect of reversal of decree upon sale in execution—Sale to bonâ fide purchaser, not a party to the decree, distinguished from sale to decree-holder.*] A sale having duly taken place in execution of a decree in force at the time cannot afterwards be set aside as against a *bonâ fide* purchaser, not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an appellate Court.

A suit was brought by a judgment-debtor to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bonâ fide* purchasers at other sales, under the same decree, who were no parties to it.

Held that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers, the suit must be dismissed.

Zain-ul-Abdin Khan *v.* Muhammad Asghar Ali Khan ... 160

SECOND APPEAL. *See* Civil Procedure Code, ss. 521, 522.

———————. *See* Practice (3).

SENTENCE—*Conviction for several offences—Separate sentence necessary upon each conviction.* *See* Several offences.

SET-OFF. *See* Civil Procedure Code, ss. 111, 216, and Execution of decree (8).

SEVERAL OFFENCES. *Personating public servant—Extortion—Conviction for each offence proved necessary—Separate sentence—Sentence necessary upon each conviction—Act XLV of* 1860, *ss.* 71, 170, 383—*Criminal Procedure Code, ss.* 35, 235.] Where more than one offence is proved in respect of which the accused has been charged and tried, a conviction for each such offence must follow, whether s. 71 of the Penal Code applies to the case or not; and, subject to the provisions of s. 71, a separate sentence must be passed in respect of each such conviction.

Under s. 35 of the Criminal Procedure Code, sentences of imprisonment cannot be passed so as to run concurrently.

In a trial for offences under ss. 170 and 383 of the Penal Code, committed in the same transaction, it appeared that but for personating a public servant the accused would not have been in a position to commit the act of extortion complained of.

Held that the first and second paragraphs of s. 71 of the Penal Code did not apply to the case; that the third paragraph also did not apply, because the words "constitute an offence" refer to the definitions of offences contained in the Code, irrespective of the evidence whereby the acts complained of are proved, and personating a public servant as defined in s. 170 was not a constituent element of extortion as defined in s. 383; that in the present case the former offence was completed before the latter had begun; and that separate sentences for each offence were, therefore, not illegal.

Queen-Empress *v.* Wazir Jan 58

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SMALL CAUSE COURT SUIT. *Suit for damages—Personal injury—Actual pecuniary damage.*] The plaintiff, in a suit for damages laid at Rs. 200, claimed Rs. 50 on account of medical expenses caused by an assault committed on him by the defendants, Rs. 50 as the costs of a criminal prosecution which he had brought against them, and Rs. 100 for injury to his reputation and feelings.

Held that inasmuch as part of the claim related to alleged actual pecuniary damage resulting from an alleged personal injury, the whole suit was, with reference to s. 6, proviso (3) of the Mufassil Small Cause Courts Act (XI of 1865), of the nature cognizable by a Court of Small Causes, and that, under s. 586 of the Civil Procedure Code, no second appeal in such suit would lie. *Gunga Narain Moytro v. Gudadhar Chowdhry* referred to.

Jiwa Ram Singh *v.* Bhola 49

(2) ———. *Suit for enforcement of hypothecation against moveable property—Act XI of* 1865, s. 6.] *Held* that an assignment by endorsement of a registered bond hypothecating certain crops was a transaction relating to moveable property, and registration of such endorsement was not required by s. 17 of the Registration Act (III of 1877) or s. 54 of the Transfer of Property Act (IV of 1882); and that a suit by the assignee to enforce the hypothecation was not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, in which a second appeal would be barred by s. 586 of the Civil Procedure Code. *Surajpal Singh* v. *Jairamgir* followed. *Ram Gopal Shah* v. *Ram Gopal Shah* and *Appavu Pillai* v. *Subraya Muppen* referred to.

Kalka Prasad *v.* Chandan Singh 20

STRIDHAN. *See* Hindu Law (2).

SUIT, *valuation of.* (*Jurisdiction*). *See* Act XV of 1877, s. 5.

———. (*By assignees, zamindars, for arrears—Not barred for want of Collector's certificate.*)] *See* Act XXIII of 1871.

——— *by mortgagee for sale of mortgaged property.* (*Purchaser not a party to suit—Sale of mortgaged property in execution of decree obtained by mortgagee*). *See* Mortgage (5).

———. *By Muhammadan for possession of immoveable property by right of inheritance to mother.* *See* Limitation (3).

———, *by zamindár for removal of building* (*Obstruction of building—Special damage—Right to sue*). *See* Public way.

——— *for damages.* *See* Small Cause Court suit (1).

——— *for dissolution of partnership.* *See* Civil Procedure Code, ss. 111, 216.

———. *For refund of money paid into Court.* *See* Civil Procedure Code, ss. 214, 244.

——— *removal of trees.* *See* Act XV of 1877, sch. ii, Nos. 32, 120.

SUMMARY TRIAL.—*Complaint including charge not summarily triable.* *See* Criminal Procedure Code, s. 260.

TREES. *See* Landholder and tenant (3).

TRESPASS. (*Lease—Right of lessee to sue.*) *See* Public thoroughfare.

VOLUNTARY TRANSFER. (*Undue influence—Act IX of* 1872 *(Contract Act), s.* 16.)] In a transaction between two persons where one is so situated as to be under the control and influence of the other, the Courts in this country have to see that such other does not unduly and unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognise.

Where a fiduciary or quasi-fiduciary relation has existed, courts of equity have invariably placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The

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exercise of this beneficial jurisdiction is not confined to cases only between guardian and ward, attorney and client, father and son, but the relief thus granted stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another.

The plaintiff, who on the death of the widow of his brother became entitled to the estate of the deceased, found himself resisted in his claim by wealthy relatives. He was a man without means. The defendant took him to his house, kept him there, found him all the money for the purpose of carrying on his litigation with his relatives, in which the plaintiff succeeded. While the litigation for mutation of names in respect of the property was pending in the Revenue Court, and while plaintiff was residing with the defendant, he executed a sale-deed in favour of defendant's brother for the nominal consideration of Rs. 2,500, or half the property he claimed; and again, shortly after the mutation case had terminated in his favour, he executed a deed of endowment of the remaining half in favour of a temple founded by the ancestor of the defendant, and in which the defendant was interested, and the result was that plaintiff was left as poor as he was when he first came into the defendant's hands.

Plaintiff sued for cancellation of the deed of endowment, on the ground that the same had been obtained from him by the exercise of undue influence and by means of fraud, and obtained a decree.

On appeal by the defendant it was *held* that, looking at all the facts, such a relation between plaintiff and defendant in the course of the year 1885 had been established as to cast upon the latter the obligation of satisfying the Court that the transaction, which was given effect to by the deed of endowment, was an honest *bond fide* transaction and one that ought to be upheld.

Sital Prasad *v.* Parbhu Lal 535

WAJIB-UL-ARZ. *See* Pre-emption.

WITNESS. *See* Defamation *and* Act X of 1873, ss. 6, 13.